

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

**Sexual Offences Against Young People**

ISSUES PAPER NO 17

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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 Otlowski (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 Ms Kim Baumeler (temporarily replacing Philip Jackson as Law Society appointee).

## **Acknowledgments**

This Issues Paper was prepared for the Board by Professor Kate Warner. Research assistance in preparing this Issues Paper was given by Kate Stewart. Dr Caroline Spiranovic prepared the section on empirical evidence relating to the harm caused by under-age sex. Valuable feedback was provided by members of the Board, Jenny Rudolf and George Zdenkowski. Professor Andrew Ashworth of All Souls College, Oxford made valuable comments on the draft during his visit to the Law School in January/February. Bruce Newey edited and formatted the final version of this Issues Paper.

## **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 Institute's Board agreed to take on the project, and has also taken on a related project arising out of the same case which considers the law prohibiting the publication of information which identifies a complainant in a sexual offence case (the Institute intends to release an Issues Paper for this project in the near future).

## How to Respond

The Tasmania Law Reform Institute invites responses to the issues discussed in this Issues Paper. Questions are contained within the paper. The questions are intended as a guide – you may choose to answer all, some or none of them. Please explain the reasons for your views as fully as possible. It is intended that responses will be published on our website, and may be referred to or quoted from in a final report. If you do not wish your response to be so published, or you wish it to be anonymous, simply say so, and the Institute will respect that wish. After considering all the responses, it is intended that a final report, containing recommendations, will be published.

Responses should be made in writing by **29 June 2012**.

If possible, responses should be sent by email to: [law.reform@utas.edu.au](mailto:law.reform@utas.edu.au)

Alternatively, responses may be sent to the Institute by mail or fax:

Tasmania Law Reform Institute  
Private Bag 89,  
Hobart, TAS 7001  
Fax: (03) 62267623

If you are unable to respond in writing, please contact the Institute to make other arrangements. Inquiries should be directed to Jenny Rudolf on the above contacts, or by telephoning (03) 6226 2069.

The Issues Paper is available at the Institute's web page at [www.law.utas.edu.au/reform](http://www.law.utas.edu.au/reform) or can be sent to you by mail or email.

# Executive Summary

This project deals with the law in relation to the defence of mistake about age when a person has been charged with a sexual crime against a young person.

The 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 hundred or so clients was prosecuted gave rise to controversy and criticism of both the decision of the Director of Public Prosecutions and the law relating to the crime of sexual intercourse with a young person. The Attorney-General responded to criticisms of the law by referring to the Institute 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.

In developing the project plan the Institute resolved to consider the mistake as to age defences for all sexual offences involving young persons and to consider the unrelated issue of extra-territoriality of the crime of maintaining a sexual relationship.<sup>1</sup>

## Part 1: Introduction

Part 1 of the Issues Paper describes the project's scope and summarises the criminal proceedings arising out of the particular child prostitution case that led to the referral to the Institute. It then discusses the harm at which laws criminalising sexual conduct with young people are directed and provides an overview of research on the harmful effects of child sexual abuse. The review of this research concludes that sexual contact between adults and children may lead to poor psychological adjustment in children as they develop and that this justifies the presumption of harm that underlies the prohibition of adult sexual activity with children.

## Part 2: The Current Law

The primary focus in Part 2 is an analysis of the current law in relation to the defence of mistake as to age to sexual offences which relate to children. The offences of sexual intercourse with a young person; aggravated sexual assault and indecent assault; indecent act with a young person and procuring sexual intercourse with a young person; maintaining a sexual relationship with a young person; and the production of child pornography material are discussed in five separate sections to give an understanding of the scope and operation of the defence of a mistaken belief that the young person is over the age of consent.

To understand the scope of the defence of mistake as to age, it is also necessary to explain when consent can operate as a defence. Crimes such as sexual intercourse with a young person only require proof that a person had sexual intercourse with a person under the age of 17 years. The *Criminal Code* (the 'Code') expressly provides that an honest and reasonable mistaken belief that the young person was over the age of 17 is a defence. The general rule is that consent is not a defence. However, there are exceptions to this general rule when the age disparity between the accused and the young person is not great: if the accused is no more than 5 years older than a young person of 15 or 16, or no more than 3 years older than a young person of 12, 13, or 14, consent is a defence. We call these 'age similarity consent defences'. The *Code* is silent as to whether an accused can combine the general mistake defence in s 14 of the *Criminal Code* with the consent defence to argue a mistake as to age.

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<sup>1</sup> Justice Blow suggested the Institute consider whether the law should be amended to allow it to take into account unlawful sexual acts committed outside Tasmania to contribute towards a charge of maintaining a sexual relationship with a young person contrary to s 125A of the *Code*. See para 2.5.2.

For example, a person aged 18 can lawfully have sexual intercourse with a young person of 15 or 16. If they have sex with a 14-year-old but believe that the young person is 15, it is unclear if the defence of mistake is open.

The discussion of the crime of maintaining a sexual relationship reveals some anomalies in relation to the defence of mistake as to age as well as concern about the inability of the courts to consider alleged unlawful sexual acts committed outside Tasmania.

### **Part 3: The Need for Reform**

The analysis of the current law in Part 2 reveals that there are a number of problems with the law and possible areas for reform which are discussed in Part 3.

#### ***The absence of a ‘no defence age’***

A ‘no defence age’ is the age of a child or young person below which there is no defence of consent or mistake as to age available to a person charged in relation to sexual activity with a child or young person. For example, in Victoria, an accused person who has sexual intercourse with a young person who is under the age of 12, cannot argue that he (or she) thought the young person was over the age of consent – such a mistake is irrelevant to guilt (as is the young person’s consent). The no defence age is therefore 12 in Victoria. In some jurisdictions it is higher – it is 13 in Western Australia and the United Kingdom, and 16 in South Australia. In some jurisdictions it is lower – it is 10 in New South Wales. In contrast, in Tasmania there is no ‘no defence age’. This means that it is possible for an accused person to raise the defence of a mistaken belief that the young person was over the age of 17 no matter how young the child is. Nor is there any limit to the age of the accused. So an accused person over the age of 50, who has sex with a child of 12, has a defence if he can prove he honestly and reasonably believed she was over the age of 17.

#### ***Should there be additional restrictions on the defence of mistake as to age?***

In the debate about the Director of Public Prosecution’s failure to prosecute the clients in the case which led to the current referral, it was suggested that the Tasmanian law in relation to mistake was too liberal. As well as having a no defence age, some jurisdictions limit the mistake as to age defence by restricting it to accused persons below a certain age. In other jurisdictions the mistake as to age defence is made more onerous by requiring the accused to take positive steps to ascertain the age of the young person.

Whether such restrictions should be adopted in Tasmania is a question on which the Institute seeks views.

#### ***Undue inconsistency***

The discussion of the current law reveals that there are inconsistencies in the current law in relation to the onus of proof for the defence of mistake as to age for child sexual offences. For sexual intercourse with a young person, indecent act with a young person and procuring unlawful sexual intercourse with a young person, the onus of proof is on the accused to prove an honest and reasonable mistake as to age. But for aggravated sexual assault and indecent assault, the onus is on the Crown to disprove that the accused had made an honest and reasonable mistake. For maintaining a sexual relationship with a young person the onus is on the accused. However, if any of the unlawful sexual acts relied upon are an aggravated sexual assault or an indecent assault, the trial judge will have to direct the jury differently as to the onus of proof if they do not find at least three unlawful sexual acts established as is required to establish the offence of maintaining an unlawful sexual relationship with a young person.

There is no rational reason for such inconsistencies in the onus of proof and they create unnecessary complexity and potential for confusion. This is highlighted by the case of *Tasmania v Martin* where the trial judge had to direct the jury that for the crime of sexual intercourse with a young person the onus was on the accused to prove he believed she was over the age of 17 but for the indecent assault count the onus was on the Crown. Moreover, the accused's alleged belief that the girl was over the age of consent required a quite different direction for the count of production of child exploitation material (photographing her engaged in sexual acts). This crime required a direction that the accused knew or ought to have known that she was under the age of 18.

### ***Uncertainty of the law***

The analysis of the law in Part 2 reveals that the *Criminal Code* is silent in relation to mistake as to age by a person who believed that the girl he had sex with was over the age at which she could lawfully consent by reason of an age similarity consent defence. While there is a Tasmanian case which held that such a defence is not available, more recent cases, including a decision of the High Court, suggest that this decision is at least open to question.

### ***Problems with the crime of maintaining a sexual relationship***

The discussion in Part 2 of the current law in relation to the crime of maintaining a sexual relationship reveals problems in relation to:

- the defence of mistake as to age;
- the extra-territorial application of the crime; and
- the description of the crime as a 'sexual relationship'.

Secondly, it is unsatisfactory that the court cannot consider unlawful sexual acts committed on identifiable occasions outside Tasmania:

- for the purposes of satisfying the offence's requirement of three unlawful sexual acts, and
- for the purpose of imposing sentence for the crime by considering unlawful acts committed on identifiable occasions outside Tasmania.

Thirdly, the label 'maintaining a sexual relationship' has been criticised as an inappropriate way to describe child sexual abuse and has been renamed in some jurisdictions to 'persistent sexual abuse of a child' in accordance with the Model Criminal Code's<sup>2</sup> name for the offence.

## **Part 4: Options for Reform**

### ***Toughening the defence of mistake as to age***

There are a number of possible solutions to 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. The following options are canvassed in the Issues Paper:

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<sup>2</sup> The Model Criminal Code, is prepared by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, it was intended to be a model for a uniform national Criminal Code.

- introducing a no defence age, that is, when a child is below a prescribed age (10, 11, 12 or 13 for example) no defence of consent or mistake as to age can be argued;
- abolishing the defence of mistake as to age;
- limiting the mistake as to age defence by:
  - restrictions on the age of the accused; and or
  - adding a requirement to take all reasonable steps to ascertain age.

### ***A no defence age?***

As explained above, a no defence age is the age of a child or young person below which there is no defence of consent or mistake as to age for a person charged with sexual activity with a child or young person. In favour of a no defence age it can be argued that sexual exploitation and abuse of children is so harmful and abhorrent that on policy grounds absolute liability (liability without fault) is justified where young children are concerned. Proponents of a no defence age argue that those who engage in sexual activity with young people take the risk that the young person is much younger than they appear. The aim is to encourage adults to take responsibility for their conduct and to deter them from taking the risk that the young person is underage. If there is a no defence age, people will realise that they should avoid any sexual contact with young people. It is argued that, given that the conduct is morally dubious and attendant with well-known risks, people cannot complain if the risk materialises. The difficulty of proving fault or disproving mistake is also raised in support of absolute liability.

Opponents of a no defence age rely upon arguments commonly raised against absolute liability for offences which are truly criminal rather than merely regulatory. It is argued that it is contrary to fundamental principle to impose liability to imprisonment without proof of fault, and this is particularly so for sexual offences which attract stigma and public opprobrium. Contemporary criminal law theory places great importance on the need to prove *mens rea* or a guilty mind. A no defence age dispenses with proof of knowledge, recklessness or lack of due diligence in relation to the age of the young person. It is argued that fairness and rule of law values require that there should be some element which relates to fault. Human rights arguments can also be raised to challenge a no defence age. Such challenges have succeeded in Canada and Ireland where it has been held that denying an accused a defence of mistake as to age for the crime of sexual intercourse with a young person is a deprivation of the right to liberty and is not justifiable under the values and principles essential to a free and democratic society.

Aside from arguments of principle against a no defence age, opponents have disputed the claims that public protection of children is enhanced by imposing absolute liability. In other words, the potential deterrent effect of such a measure is denied and it is argued that there is no evidence to support the argument that fear of being wrong about a young person's age will lead some adults who are contemplating having sex with a young person to desist. Moreover, it is by no means clear that imposing liability without fault (absolute liability) would have a greater deterrent effect than liability in the absence of mistake (strict liability). Advocates of a no defence age however, are convinced by the intuitive appeal of deterrence and argue that the age of a young person with whom one is contemplating sexual intercourse is likely to be a matter of which one is aware.

The argument that a no defence age is necessary because of the difficulty of proving knowledge of age is countered by the response that an appropriate way out of this difficulty is to impose a due diligence requirement, namely proof that the accused had no reasonable grounds for believing the child was over the age of consent.



**Question 1**

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

***Abolishing the defence of honest and reasonable mistake***

It could be argued that the need to recognise the particular vulnerability of children and the need to protect them from sexual exploitation and abuse is such that there should be no defence of mistake as to age. The Institute is currently of the view that it would be wrong, harsh and unfair to punish as a sexual offender against children, a person who believed that he or she was having sexual contact with a person over the age of consent and therefore doing nothing wrong.

**Question 2**

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

***An honest belief that the young person was over the age of consent***

In reforming the defence of mistake as to age, one possibility would be to adopt the Model Criminal Code and Commonwealth *Criminal Code* defence of an honest belief that the child or young person was over the age of consent, with the burden of proof on the accused. This option does not fit comfortably or consistently with *Code* principles of criminal responsibility. The Institute is also of the view that it is appropriate that the defence be a more stringent one, with the requirement that the mistake be both honest and reasonable.

**Question 3**

Assuming you favour retaining the defence of mistake as to age, would you prefer that the defence of mistake as to age be based on an honest belief (the *Criminal Code* (Cth) s 272.16 formulation) or that the mistaken belief be required to be both honest and reasonable (the current Tasmanian position)?

***Limiting the defence of mistake as to age by restrictions on the age of the accused***

An option for reform is to limit the defence of mistake as to age by restricting it to persons under a prescribed age, such as 21 or 25. This would mean child sexual offences would be absolute liability offences for persons over the prescribed age. The same arguments that have been raised above in relation to absolute liability apply here. Another objection is that the prescribed age is necessarily arbitrary and will operate to deny the defence to a person just one day older than the prescribed age.

**Question 4**

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

### ***Adding a requirement to the mistake defence to take all reasonable steps***

Another option to tighten the defence of mistake as to age is to insert a requirement that in addition to requiring that the mistake be honest and reasonable, the accused must have taken reasonable steps to ascertain the age of the complainant. For example, in New Zealand it is a defence to a charge of sexual conduct with a person under the age of consent to prove that the accused ‘had taken reasonable steps to find out whether the young person was of or over the age of [consent]’.

#### **Question 5**

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

## **Removing Uncertainty and Inconsistency**

Part 3 (the Need for Reform) identifies two issues in relation to the defence of mistake as to age that should be addressed:

- clarification of the uncertainty as to the scope of the defence of mistake as to age; and
- uniformity in relation to the onus of proof for the defence of mistake as to age.

### ***Clarifying the scope of the defence***

It is unclear whether an accused can combine the defence of mistake in the *Code* with the defence of consent. Arguably it is unfair that an older accused can always raise the defence that they honestly and reasonably believed that the young person was over the age of consent, but a young accused, who believed that the young person was of an age which (if true) would make the sexual conduct lawful, cannot necessarily argue mistake as to age in that regard.

#### **Question 6**

Should the *Code* explicitly allow an accused person to combine the mistake as to age and consent defences (for a further explanation see 2.2.3)?

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

The Institute is of the view that current inconsistencies in the onus of proving mistake as to age should be remedied. This raises the question as to whether the Crown or the accused should bear the onus of proof. In favour of placing the onus of proof on the accused is the argument that standards should be set high for people who engage in sexual intercourse with the young and as the defence relates to a matter which is peculiarly within the accused’s knowledge, it should be up to the accused to prove the mistake. For this reason, it can be argued that requiring the prosecution to assume the burden of negating a defence of honest and reasonable belief about the age of the young person poses an unreasonable obstacle to obtaining convictions of those who have been proved to have committed a sexual act with a young person.

Against placing the onus on the defence it is argued that to do so is contrary to the presumption of innocence – it is a fundamental principle that it is for the prosecution to prove its case and not the accused to disprove it. The fact that an element of the crime is ‘peculiarly within the accused’s knowledge’ is not a justification for reversing the onus or proof. Not only is a reversal of the onus of proof contrary to fundamental principles of the criminal law, the right to be presumed innocent is a human right recognised in art 14(2) of the *International Covenant on Civil and Political Rights*.

**Question 7**

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

**Reformulating the Mistake as to Age Defence as an ‘Ought to Have Known’ Test**

As an alternative to the defence of mistake as to age the Issues Paper considers the option of expressly providing for each of the child sexual offences that the accused knew or ought to have known that the young person was under the age of 17. This would have the advantage of consistency between the age element test for child sexual assault offences and child pornography offences. Against adopting this test is the argument that it does not achieve the policy objective of requiring those who have sex with children to take steps to ensure the young person is over the age of consent as effectively as the honest and reasonable mistake formulation.

**Question 8**

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

**Reforms to Maintaining a Sexual Relationship with a Young Person**

There are three issues in relation to this crime which need to be addressed:

- Whether the anomalies associated with the mistake as to age defence should be addressed by repealing the mistake as to age provision in s 125A(5).
- Because it is not clear that a court is permitted to take into account unlawful sexual acts that have been committed outside Tasmania, whether the *Code* should be amended to allow this.
- Renaming the crime should be considered to indicate more clearly that it is dealing with the sexual exploitation of young people.

**Question 9**

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



## Part 1

# Introduction

## 1.1 Scope and Background

### *Scope of the paper*

*1.1.1* This project arose out of a Tasmanian case in which a twelve-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 legal proceedings against Devine and the mother and later against Terry Martin, one of the clients, were widely reported. Media reports criticised the law and called for a review of the *Criminal Code* after the Director of Public Prosecutions (DPP) announced his decision not to prosecute the individuals investigated in the case (the other alleged clients of the girl) because there was no reasonable prospect of convicting them. Even in those cases where sexual intercourse with the girl was admitted, it was considered that the defence of a mistaken belief that the girl was over the age of consent was reasonably open. The Attorney-General responded to the criticism of the law by requesting the Tasmanian 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>3</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>4</sup> It also requested that a copy of this memorandum be attached to any review. The memorandum has been included in Appendix 1.

*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 maintaining a sexual relationship with a young person (see para 2.5.2).

*1.1.3* This Issues Paper deals with the following legal 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 (in the paper this is called 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;

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<sup>3</sup> Letter from the Attorney-General, Lara Giddings, dated 30 September 2010.

<sup>4</sup> Letter from the Attorney-General, Lara Giddings, dated 1 October 2010.

- 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 Issues Paper asks:

- 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 has excluded from the scope of the project. First, it is not proposed to review the age of consent for reasons set out in paras 3.4.6 and 3.4.7. Secondly, it does not cover the issue of the non-application of same age consent defences to anal intercourse (see 2.1.6).

*1.1.6* Concurrently the Institute is conducting an inquiry into a separate issue arising out of the case of *Tasmania v Devine*. In the light of an article published about the case in *The Mercury* in March 2010, Mr Craig Mackie, the court appointed children’s representative in care proceedings for the child at the centre of the criminal proceedings, invited the Institute to review the law in relation to the publication of information concerning child victims of sexual assault and in particular s 194K of the *Evidence Act 2001*. A separate issues paper will be published dealing with this issue.

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

*1.1.7* Part 2 of the paper sets out the current law in relation to sexual offences involving children in some detail so that the current law and its deficiencies can be clearly understood. Part 3 then sets out the need for reform and Part 4 deals with options for reform. In the remainder of Part 1, details of the child prostitution case which was the genesis of this project are explained because they provide a factual context for the discussion of the law which follows and also because the case appeared to give rise to misunderstanding and confusion. This is followed by a discussion of the empirical evidence in relation to the harm caused to children by sexual assault and premature sexual activity, again to provide context for the review of the relevant law.

### ***The criminal proceedings arising out of the child prostitution case***

*1.1.8* The case came to public attention when Devine and the girl’s mother pleaded guilty to:

- procuring unlawful sexual intercourse with a young person (*Criminal Code*, s 125C);
- being a commercial operator of a sexual services business (*Sex Industry Offences Act 2005* s 4); and

- receiving a fee derived directly from sexual services provided by a child in a sexual services business (*Sex Industry Offences Act 2005* s 9(2)).

Devine also pleaded guilty to permitting unlawful sexual intercourse with a young person on premises (contrary to *Criminal Code*, s 125). They were each sentenced to 10 years' imprisonment,<sup>5</sup> the mother with a non-parole period of 7 years, Devine with a non-parole period of 8 years.

*I.1.9* According to the memorandum of advice from Assistant DPP, Daryl Coates SC, to the DPP dated 14/9/2010 (reproduced in Appendix 1 of this Issues Paper), the police investigation was launched in early October 2009 as a result of police being notified by the Child Protection Agency. C was 12-years-old at the time. Statements were obtained from the complainant and her sister. Clients were solicited by means of advertisements placed by Devine in *The Mercury*. C was advertised as 'New in town, Angela 18 years old' and a phone number was given. After the first advertisement, M booked the Mid City Hotel and Devine, M and C went there. C saw many clients over a two-day period and had sexual intercourse with them. C estimated that over the two days she earned \$2000. After this occasion at the hotel, it was decided that she would work at Devine's flat in Glenorchy. The advertisement was run again on five occasions over the next three weeks. Over a four-week period the complainant had sexual intercourse with more than 100 men.<sup>6</sup> While *The Mercury* reported that a list of phone numbers and a booking diary were found by the police at Devine's flat,<sup>7</sup> in an interview on Tasmanian current affairs program, *Stateline*, the DPP stated, "[t]here was no list at all. There was no diary of any forensic use. There were some scribbles and some times and so on but absolutely no list of clients with names or anything like that".<sup>8</sup> Through telephone records a group of clients was identified. Statutory declarations were obtained from five of them for the purpose, in the first instance, of gathering evidence against Devine and M rather than obtaining evidence against the clients. At this stage only one client, Terry Martin, a member of the Tasmanian Parliament at the time of the alleged crimes, was interviewed on video. Eventually 205 telephone numbers with links to people who may have had contact with the complainant were identified. Many denied calling, stated someone else had access to their phone or admitted the telephone call but claimed they rang for amusement only or denied turning up to the appointment. Nineteen people admitted to some form of sexual activity with C. Of the 19 people who admitted to sexual intercourse (in addition to Martin) only seven agreed to video interviews.

*I.1.10* The case made headlines nationally as well as locally, and the then Children's Commissioner, Paul Mason, called for the girl's clients to be prosecuted as a deterrent to any future prostitution of children.<sup>9</sup> The decision of the DPP not to proceed with charges against almost all of the many clients created considerable controversy.<sup>10</sup> He defended his decision not to prosecute the men in an interview on the Tasmanian current affairs television program *Stateline*<sup>11</sup> and the following morning his advice to the Acting Commissioner of Police was published in full in *The Mercury*. The advice was in the form of a memorandum to the DPP from the Assistant DPP, Daryl Coates SC,<sup>12</sup> which the DPP had endorsed and forwarded to the Assistant Commissioner. The memorandum included a summary of the evidence of the seven men who admitted to sexual intercourse with C in video interviews.

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<sup>5</sup> *State of Tasmania v Devine*, COPS, Evans J, 25 March 2010; *State of Tasmania v DEL*, COPS, Evans J 14 May 2010.

<sup>6</sup> See Memorandum from Daryl Coates SC to Tim Ellis SC, 14 September 2010, 2; in an interview on *Stateline*, the DPP put the number somewhere between 100 and 200: Australian Broadcasting Corporation (ABC), 'DPP answers critics' *ABC Stateline*, 1 October 2010 (Tim Ellis SC) ('*Stateline*').

<sup>7</sup> Sue Neales, 'Sex with girl culprits to get off', *The Mercury* (Hobart), 25 September 2010.

<sup>8</sup> *Stateline*, above n 6, (Tim Ellis SC).

<sup>9</sup> Matthew Denholm, 'Outrage as child-sex offenders let off' *The Australian* (New South Wales), 29 September 2010.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Stateline*, above n 6.

<sup>12</sup> 'DPP clarifies child-sex facts', *The Mercury* (Hobart), 2 October 2010. This memorandum is reproduced in Appendix 1.

1.1.11 The memorandum gave a number of reasons for the decision not to prosecute. First, it was likely that the admissions of those who refused to take part in video interviews, including the admissions in statutory declarations, would be inadmissible in evidence. C indicated to police that she would be unable to identify any suspects and did not wish to participate in identification procedures. In any event, given the number of people she'd had sexual intercourse with, any identification she made would be of 'doubtful probative value', in other words, it would be of little weight. In the absence of admissions in a video interview, there was no admissible evidence against the suspects.<sup>13</sup> In relation to those who made admissions in a video interview, the view was taken that there was no reasonable prospect of conviction as it was likely that a jury would be satisfied that there was an honest and reasonable belief by the men in question that C was of or above the age of 17 years. With the exception of one suspect (Male 6), the following applied:

- they all replied to a newspaper advertisement stating C was 18 years old. Some stated they did not believe it was possible to advertise prostitution services unless you were 18 years of age;
- a number of them, upon asking her age, were told by C she was 18 or 19;
- they had limited conversation with her;
- they were generally in a darkened room;
- they had not sought to have sex with someone under age and were not expecting to have sex with someone under age;
- the complainant's physical appearance was of someone who looked much older than 12 years of age;
- the improbability of anyone advertising a 12-year-old for prostitution;
- they stated that they believed her to be 18 years old or older.

1.1.12 The circumstances in relation to Male 6 were different. The Assistant DPP's memorandum states:

In respect of (Male 6), at the time he was only 17 years of age, the complainant got into his bed at a party, he thought she was 17 years of age and text messages confirm this belief. Given the circumstances and his age, I am of the view there is no reasonable prospect of conviction.

The summary of Male 6's video statement indicated that C and her girlfriend told him that she was aged 17 years and that when he found out her true age he ceased having contact with her.

The memorandum stated that even if there was a reasonable prospect of conviction, it was not in the public interest to proceed with the prosecution in the case of the seven men. C was still only 13 years of age. There would have to be separate trials. The Crown would be obliged to call C at each trial because, although identity of the accused would not be likely to be in issue, her evidence would be highly relevant to the issue of an honest and reasonable belief as to age. Discussions with C's father indicated that he believed it would be traumatic for her to give evidence and after discussing it with her he indicated that she did not wish to give evidence. The Crown could compel her to do so but even if it did and the men were convicted, it is likely that they would be sentenced on the basis that they did not seek to have sex with an underage girl and honestly believed that she was not underage. Their culpability would be 'miniscule' compared with that of M and Devine and they may not have incurred a custodial sentence. In the *Stateline* interview, the DPP indicated that of the two factors weighing against prosecuting the seven men, namely the lack of a reasonable prospect of conviction and the additional trauma to C of giving evidence, it was the former that was the most important but the trauma to C of consecutive trials was also a factor: "[t]o keep her going just to satisfy a blood lust

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<sup>13</sup> The *Evidence Act 2001* (Tas) s 85A provides that a video-recording is a precondition of the admissibility of admissions to the police where the offence is a 'serious offence' which includes sexual intercourse with a young person.



lynch mob mentality that's being stirred up by people with certain agendas, I don't think is in the public interest."<sup>14</sup>

*1.1.13* More than twelve months after this announcement, one of the clients, Terry Martin was tried for indecent assault, sexual intercourse with a young person and production of child exploitation material. In contrast with the other men involved, the Crown case against Martin was that he engaged in sexual acts with the girl over an extended time in his own well-lit home during the afternoon. All counts related to conduct at Martin's home. He was not charged in relation to anything that happened at Devine's unit when he met C on the first occasion. He was convicted of sexual intercourse with a young person and of production of child exploitation material. He was sentenced on 29 November 2011 to 10 months' imprisonment, the execution of which was wholly suspended. The jury could not agree on the count of indecent assault that allegedly occurred first and Martin admitted lasted for some 50 minutes. As a result this charge was dismissed. The outcome in relation to the charge of indecent assault could be said to vindicate the DPP's decision not to prosecute the seven men who had admitted to sexual intercourse in the recorded police interviews on the grounds there was no reasonable prospect of conviction.

*1.1.14* The fact that so many of the men who had sex with the girl were seen to 'get off' gave rise to public concern and calls for any legal loopholes to be closed. To quote an editorial from *The Mercury*:

Section 124 of the Criminal Code allows defendants to argue that they had reasonable grounds to believe the person was an adult. It seems extraordinary that anyone could possibly mistake a 12-year-old girl for an 18-year-old but the burden of proof is on the prosecutors.<sup>15</sup>

Lobby groups criticised the law<sup>16</sup> with Steve Fisher from Beyond Abuse, stating 'I absolutely believe it reinforces Tasmania's position as a haven for paedophiles'.<sup>17</sup> Academics too called for changes to the law.<sup>18</sup> The Opposition spokeswoman on Justice called for reform to be considered.<sup>19</sup> Public criticisms of both the law and the failure of the DPP to prosecute the other men who were clients of C were repeated during and after Martin's trial in November 2011 and *The Mercury* again reprinted the DPP's advice to the police in full.<sup>20</sup> The final episode in the legal proceedings against Terry Martin occurred in February 2012 when he was sentenced to one month's imprisonment (wholly suspended) for possession of the child exploitation material found by the police when they searched his home on 27 October 2010 for evidence of his suspected conduct in relation to C.<sup>21</sup>

*1.1.15* The Institute acknowledges that the subject matter of this Issues Paper is confronting. Many members of the public are of the view that people who commit offences against children should be very severely punished. This was apparent in the community response to the revelations in relation to the child prostitution case against Devine and M. There were calls for naming and shaming by publication of the list of names of the girl's alleged clients even if they were not prosecuted. *The Mercury* reported that Martin's suspended sentence had provoked outrage.<sup>22</sup> However, the Institute is

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<sup>14</sup> *Stateline*, above n 6, (Tim Ellis SC).

<sup>15</sup> 'Editorial: Close legal loophole', *The Mercury* (Hobart), 29 September 2010. It is not accurate to say the burden of proof is on the prosecutors in relation to the defence of mistake as to age in s 124: see discussion at 2.2.1.

<sup>16</sup> See Damien Brown, 'Mum of girl prostitute jailed', *The Mercury* (Hobart), 15 May 2010.

<sup>17</sup> Sarah Bester, 'Child sex case raises legal questions', *ABC News*, 26 September 2010.

<sup>18</sup> See, 'Expert calls for law reform after Tas child sex case' ABC PM, 29 September 2010. Carolyn Taylor called for the onus of proof for mistake as to age to be on the defendant (which it already is in the case of s 124).

<sup>19</sup> David Killick, 'Warning on sex charges' *The Mercury* (Hobart), 3 October 2010.

<sup>20</sup> David Killick, 'Girl-sex case outrage' *The Mercury* (Hobart), 23 November 2011.

<sup>21</sup> *State of Tasmania v Terence Lewis Martin*, COPS, 16 February 2012, Blow J.

<sup>22</sup> Anne Mather, 'Sentence provokes outrage', *The Mercury* (Hobart), 30 November 2011; Zara Dawtrey, 'Tassie a "paedophile paradise"' *The Mercury* (Hobart), 5 December 2011.

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>23</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.

## 1.2 Empirical evidence relating to under-age sex

*1.2.1* The legal issues in this paper 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 a young person 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.

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

*1.2.2* 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>24</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.

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

*1.2.3* 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>25</sup>

In a Canadian decision<sup>26</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. She 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

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<sup>23</sup> Ten is the age of criminal responsibility: *Criminal Code* s 18(1).

<sup>24</sup> A Smith et al, *Secondary Students and Sexual Health 2008: Results of the 4<sup>th</sup> National Survey of Australian Secondary Students HIV/AIDS and Sexual Health* (Australian Research Centre in Sex, Health & Society, La Trobe University, Melbourne, 2009) 26.

<sup>25</sup> *Clarkson v The Queen; EJA v The Queen* [2011] VSCA 157, [3].

<sup>26</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].

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.

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.

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

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>27</sup>

*1.2.4* 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 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 is 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***

*1.2.5* The evidence base concerning the harmful effects of childhood sexual abuse (CSA) is limited by a number of methodological issues. This makes it difficult to draw definitive conclusions concerning the effects of CSA on long-term psychological functioning. Methodological issues include the use of non-representative samples such as college/university student or clinical populations, inconsistent definitions of CSA across studies, and failure to control for confounding effects such as family environment. The most reliable evidence on the effects of CSA comes from meta-analytic

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<sup>27</sup> *R v G* [2009] 1 AC 92, 109 [49].

studies although these studies are unable to overcome all of the above limitations and the aggregation of findings from multiple studies may introduce new difficulties and problems.<sup>28</sup>

1.2.6 Rind, Tromovitch and Bauserman conducted the most prominent and perhaps controversial meta-analysis in 1998 based on a review of findings from 59 studies based on college samples.<sup>29</sup> The authors found that although victims were less well adjusted than controls, the effects of CSA were typically non-significant after the effects of family environment (eg, level of social bonding and attachment, abuse and neglect) had been controlled for. They contended that the results from this meta-analytic study challenge the common belief that the effects of CSA are intense and pervasive.

1.2.7 The publication of this article resulted in an extensive backlash from other academics and practitioners,<sup>30</sup> as well as the broader community, and culminated in the condemnation of the study and its findings by the United States Congress.<sup>31</sup> This reaction clearly highlights the extent of concern in the broader community regarding the wrongfulness and harms associated with childhood sexual abuse.

1.2.8 Dallman et al,<sup>32</sup> as well as Hyde,<sup>33</sup> quite rightly expressed concern regarding the possibility of misrepresenting Rind, Tromovitch and Bauserman's findings as implying that CSA is not harmful particularly given that the findings are based on college students. As CSA has been linked with poor academic outcomes, Dallman et al argued that reliance on college samples would exclude individuals who have been severely affected by experiences of CSA.<sup>34</sup> Hence, studies based exclusively on college samples may greatly underestimate the negative effects of CSA. Another issue with the Rind, Tromovitch and Bauserman's meta-analysis is that they used a relatively broad definition of CSA that included contact as well as non-contact sex offences.<sup>35</sup> It is quite plausible that the magnitude of the effects of CSA would be greater for those who had experienced relatively more serious contact sex offences.

1.2.9 A meta-analysis by Paolucci, Genius, and Violato of 37 published studies on the effects of CSA, defined as any unwanted sexual contact, found that CSA was associated with a number of negative short-term and long-term effects such as suicidality, sexual perpetration, poorer academic performance and psychiatric conditions such as Post-Traumatic Stress Disorder and Depression.<sup>36</sup>

1.2.10 More recent studies have also shown that the level of harm associated with CSA is mediated by the severity of contact. A study by Jonas et al involving a random sample of over 7,000 English households demonstrated that the odds of developing a range of psychological disorders were greater

<sup>28</sup> For a brief discussion see, R Maniglio, 'The impact of child sexual abuse on health: A systematic review of reviews' (2009) 29(7) *Clinical Psychology Review* 647.

<sup>29</sup> B Rind, P Tromovitch and R Bauserman, 'A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples' (1998) 124(1) *Psychological Bulletin* 22.

<sup>30</sup> S J Dallman, 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; S J Ondersma, M Chaffin, L Berliner, I Cordon, G S Goodman, and D Barnett, 'Sex with children is abuse: Comment on Rind, Tromovitch, Bauserman (1998)' (2001) 127(6) *Psychological Bulletin* 707; J S Hyde, 'Methodological issues in inferences from meta-analysis about the effects of child sexual abuse' (2008) 19(4) *International Journal of Sexual Health* 15.

<sup>31</sup> B Rind, P Tromovitch and R Bauserman, 'The validity and appropriateness of methods, analyses, and conclusions in Rind et al. (1998): A Rebuttal of Victimological Critique from Ondersma et al. (2001) and Dallman et al. (2001)' (2001) 127(6) *Psychological Bulletin* 734.

<sup>32</sup> Dallman et al, above n 30.

<sup>33</sup> Hyde, above n 30.

<sup>34</sup> Dallman et al, above n 30, 716.

<sup>35</sup> Ibid 718-719.

<sup>36</sup> E O Paolucci, L Genius and C Violato, 'A meta-analysis of the published research on the effects of child sexual abuse' (2001) 135(1) *The Journal of Psychology* 17.

for CSA experiences involving non-consensual intercourse than they were for CSA experiences involving non-consensual sexual touching or unwanted sexual talk.

*1.2.11* A study by Kendler et al<sup>37</sup> demonstrated that although all three types of CSA experiences assessed (i.e., non-genital contact, non-penetrative genital contact and sexual intercourse) were associated with a range of psychological disorders, the odds of developing each disorder were highest for experiences of CSA involving sexual intercourse.

*1.2.12* It is clear from this brief review of the literature that CSA is associated with long-term harmful effects and that more harmful effects are associated with CSA experiences involving sexual intercourse. However, it is difficult to decipher with any certainty the magnitude of this association and the extent to which it may be causal due to methodological issues including the fact that many studies have failed to control for confounding effects and that studies vary considerably with respect to definitions of CSA adopted as well as the samples employed. In his systematic review of 13 recent meta-analytic reviews, Maniglio stated that:

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>38</sup>

*1.2.13* There is nonetheless sufficient empirical 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.

## 1.3 Terminology

### *Strict and absolute liability*

*1.3.1* 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.

*1.3.2* In Australia and Canada, absolute liability describes the situation where conviction follows from proof of the commission of the prohibited act. Strict liability refers to offences where fault is based on negligence.<sup>39</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 16. If this offence does not require proof of knowledge that the young person was under 16 but allows the defendant to argue that they had a mistaken belief on reasonable grounds that the young person was 16 or over, the offence would be described as strict liability. If the offence requires neither proof of

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<sup>37</sup> K S Kendler, C M Bulik, J Silberg, J M Hettema, J Myers J and C A Prescott, 'Childhood sexual abuse and adult psychiatric and substance use disorders in women: An epidemiological and co-twin control analysis' (2000) 57(10) *Archives of General Psychiatry* 953.

<sup>38</sup> Maniglio, above n 28, 654.

<sup>39</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) 194-195.

knowledge of the age of the young person nor allowed 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).

1.3.3 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>40</sup>

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

1.3.4 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>41</sup>

1.3.5 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 are many.<sup>42</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 Issues Paper the Australian meaning of the terms strict liability and absolute liability is used.

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<sup>40</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>41</sup> *Criminal Code* (Cth) s 272.8(1); s 272.9(1); see 4.3.4.

<sup>42</sup> Ashworth, above n 40, 160-161.

## 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 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 final group of sex offences involving children are the offences relating to child pornography (s 130 – 130E). A list of these offences is set out for easy reference in Appendix 2.

### *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 under the age of 18 if he was under the age of 21. Three separate 'age similarity defences'<sup>43</sup> also applied to this crime. Indecent assault only applied to females, 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>44</sup> A new s 124 was substituted in 1987 which made the offence gender neutral and

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<sup>43</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>44</sup> No 6 of 1974, s 2.

broadened the age similarity defences.<sup>45</sup> The offence of maintaining a sexual relationship with a young person (s 125A) was inserted into the *Code* in 1994.<sup>46</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>47</sup> In 2001, the new offence of indecent act with a young person was added to the *Code*.<sup>48</sup> Procuring unlawful sexual intercourse with a person under 17 years was added in 2005 together with a series of child exploitation offences.<sup>49</sup>

### ***Rationale***

2.1.4 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>50</sup>

2.1.5 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 defences 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.

### ***Age of consent***

2.1.6 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 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.

## **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 2). The external elements are

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<sup>45</sup> No 71 of 1987, s 7.

<sup>46</sup> No 72 of 1994.

<sup>47</sup> No 12 of 1997, s 6.

<sup>48</sup> No 83 of 2001.

<sup>49</sup> No 29 of 2005.

<sup>50</sup> Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Project no 101, Discussion Paper 80 (footnotes omitted).



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>51</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>52</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 15 years and the accused person was not more than 5 years older than that person; or
- (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.

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 The scope of the defence of mistake as to age is not immediately 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’. The discussion which follows is somewhat technical. Those readers who are not interested in the detail of the argument can skip to para 2.2.12. The point of the discussion is to indicate that the answer to the question is unclear.

2.2.4 In *McCabe*<sup>53</sup> Crawford J considered the question of the application of the general defence of mistake to s 124 under an earlier version of s 124 (defilement of a young person). The accused was aged 20 and there was evidence that the 13-year-old complainant had told him she was 16-years-old. Under s 124(3) consent was a defence if C was over 15 and A was under 21. Defence counsel

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<sup>51</sup> Reading s 124(2) as imposing a legal burden on D does not infringe ‘the principle of legality’: *Momcilovic* [2010] VSCA 50 see eg [44]-[45] (French CJ).

<sup>52</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).

<sup>53</sup> [1980] Tas R 134.

adduced evidence from the accused as to his belief that she was 16-years-old, arguing that this was relevant as s 124(3) and s 14 provided a defence if he believed on reasonable grounds that she was over 15. In a brief judgment delivered during the trial, Crawford J ruled that the evidence of the accused's belief was irrelevant. He held that the defence of mistake was not available under s 14. He gave two reasons. First, the question of construction of s 124 should be determined in the light of the common law and the common law decision in *Reg v Prince*.<sup>54</sup> This decision, which had been applied in common law jurisdictions in Australia, was authority for the proposition that knowledge or belief as to the age of the girl is not relevant in any way to age related sexual offences. In the words of Crawford J:

The decision in *Reg v Prince* has been applied at common law in Australia in *Reg v Gibson* (1884) 11 VLR 94 and *Reg v Kariaskakis* (1956) 74 WN (NSW) 457. All three cases deal with analogous legislation (not in Codes). As Glanville Williams has observed, *Criminal Law: The General Part* (2<sup>nd</sup> ed) para 85, 243 *Reg v Prince* is now 'riveted' upon English law in respect of the question of age, and Howard, *Criminal Law* (3<sup>rd</sup> ed) p 385, has observed, the majority decision (in *Reg v Prince*) that knowledge or belief as to the age of the girl was not relevant in any way applies, in the absence of a High Court pronouncement on the subject, to age requirements in sex offences generally – this is of course, subject to any express provision in the statute, such as s 124(2).

2.2.5 Crawford J's second reason relied upon the now repealed s 124(6) which provided: "Except as hereinbefore provided the consent of a girl shall in no case be a defence to any such charge". Crawford J stated: "In any case apart from that principle [the principle in *Reg v Prince*], as to the point taken here that reasonable mistake as to age is applicable to subs (3), the positive terms of subs (6), in which the words 'in no case' are used, prevent such an application."

2.2.6 Crawford J's ruling placed no reliance on the fact that s 124(2) expressly provides for the defence of mistake as to age in the case of a belief that the complainant is 17 years of age. This can perhaps be explained by the decision in *Martin*,<sup>55</sup> the leading case at the time on the application of s 14. The question of law to be resolved in *Martin's case* was whether an accused's honest and reasonable but mistaken belief that he was divorced was a defence to the crime of bigamy. At that time bigamy was a crime contrary to s 193 of the *Code*. Section 193(5) expressly provided that an accused's belief that his wife was dead was a defence but it was silent as to a belief in divorce. As to the Crown's argument that the canon of construction *expressio unius exclusio alterius* should be applied to exclude the defence of mistake as to divorce because mistake as death was expressly provided for, Burbury CJ said:

But the inclusion of this particular instance of the application of the defence of mistake of fact to a particular external element ... does not in my view afford a sufficient reason for concluding that it was the intention of the legislature to limit the application of the defence to this one external element. It cannot be said that s 193(5) 'deals with' mistake of fact for all purposes within the meaning of s 2 [of the *Criminal Code Act 1924*]. The Code deals generally with mistake of fact in s 14 and ineptly deals with one application of it in s 193(5). In a penal statute the reasoning based on the Latin canon of construction to which I have referred is of little weight.<sup>56</sup>

2.2.7 Neasey J also rejected the Crown's argument that s 193 covered the field in relation to mistake defences: "An argument based upon the principle *expressio unius exclusio alterius* cannot, I think, begin to displace the conclusion reached."<sup>57</sup> While he relied primarily on s 8 of the *Criminal*

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<sup>54</sup> (1875) LR 2 CCR 154.

<sup>55</sup> [1963] Tas SR 103.

<sup>56</sup> [1963] Tas SR 103, 119.

<sup>57</sup> *Ibid* 151.

*Code Act 1924*, which preserves common law defences and therefore the principle in *Thomas's* case, he stated that 'even if s 14 stood alone, [he] would have no doubt that the defence was open'.<sup>58</sup>

2.2.8 Crawford J in *Martin* did not expressly refer to the *expressio unius* principle but he agreed that an accused's mistaken belief that he was divorced was a defence to the crime of bigamy either because "in applying s 14 and construing the 'statute constituting the offence' I would apply *Thomas's case* (1937) 59 CLR 279" and *Thomas*, a decision of the High Court held that an honest and reasonable belief in dissolution of marriage (divorce) was a defence despite the statute's failure to include it.

### ***Does McCabe represent the current legal position?***

2.2.9 The decision in *McCabe* is open to challenge. While there is no doubt that s 8 of the *Criminal Code Act* can be relied upon to incorporate common law defences which are not inconsistent with the *Code*, it can be argued that it is rather unorthodox to use the common law to exclude the operation of s 14 as Crawford J did in *McCabe* by relying upon the decision in *Prince's* case. In doing this His Honour arguably exceeded the permissible uses of the common law in interpreting the *Code*. While it is permissible to interpret s 14, as a general principle of criminal responsibility, in the light of the equivalent common law principles,<sup>59</sup> it can be argued that this does not mean that s 124 should be interpreted in the light of a broad principle attributed to a common law decision to the effect that mistake as to age is not relevant to age related sex offences. In any event, as a result of recent High Court and House of Lords decisions, the decision in *Prince*, which held that an honest belief on reasonable grounds that the girl concerned was over the age of 16 years was no defence to a charge of abduction of a girl under the age of 16, no longer stands for the broad general principle that a mistake as to age affords no defence to age related sexual offences.

2.2.10 Although a common law case, the High Court's decision in *CTM*<sup>60</sup> is relevant to the interpretation of s 124 and s 14. In *CTM*, the High Court held that an honest and reasonable belief that the complainant was over the age of 16 years (the '*Proudman* defence')<sup>61</sup> was a defence to a charge of sexual intercourse with a young person over the age of 14 years but under the age of 16 years contrary to s 66C(3) of the *Crimes Act 1900* (NSW) notwithstanding an amendment removing the express statutory defence of mistake as to age for that crime. Hayne J referred to the decision in *Prince*, which he clearly regarded as contrary to the High Court decisions in *Thomas*<sup>62</sup> and *He Kaw Teh*.<sup>63</sup> In the UK, it is clear that *Prince's* case no longer stands for the broad proposition that the element of the age of the victim entails absolute liability (strict liability in UK terminology). In both *B (A Minor) v DPP*<sup>64</sup> and *R v K*<sup>65</sup> the House of Lords declined to find that the offences in question (inciting a child under the age 14 to commit an act of gross indecency and indecently assaulting a girl under the age of 16) were offences which excluded any recourse to the defence of mistake as to age. In *B (A Minor) v DPP* it was held that there was no necessary implication negating *mens rea* as to the age element of the offence, so that the mental element for the offence was an absence of a genuine belief by the accused that the victim was 14 years or above. Lord Steyn stated that *Prince's* case was "out of line with the modern trend in criminal law that the defendant should be judged on the facts as he believes them to

<sup>58</sup> [1963] Tas SR 103,150.

<sup>59</sup> *Martin* [1963] Tas SR 103, 110-112 (Burbury CJ), 144-145 (Crawford J), 149-150 (Neasey J).

<sup>60</sup> (2008) 236 CLR 440.

<sup>61</sup> So called from the decision in *Proudman v Dayman* (1941) 67 CLR 536.

<sup>62</sup> (1937) 59 CLR 279.

<sup>63</sup> (1985) 157 CLR 536.

<sup>64</sup> [2000] 1 All ER 833.

<sup>65</sup> [2001] 3 All ER 897.

be”. He added, “For all these reasons I would reject counsel’s attempt to reinvigorate *Prince’s* case: it is a relic from an age dead and gone.”<sup>66</sup>

In *R v K*<sup>67</sup> the House of Lords held similarly in relation to indecently assaulting a girl under 16. The presumption of *mens rea* was not displaced and an honest belief that the girl was 16 entitled the accused to an acquittal. It is notable that some of their Lordships referred to the presumption of *mens rea* as a ‘constitutional principle’ – unusually strong language to emphasise the importance of what in English law is a matter of statutory construction rather than compatibility with a written constitution.<sup>68</sup>

2.2.11 It is clear that the common law no longer supports the non-application of s 14 to age related sex offences. However, the question of statutory construction remains. Section 124 has been amended since *McCabe* was decided, so that s 124(6) as relied upon by Crawford J, no longer exists. However, by providing that consent is a defence to a charge ‘only’ in the circumstances set out in the age similarity defences in subsection (3), Crawford J’s second reason for deciding against the application of s 14 to s 124(3) remains. His argument appears to be that allowing s 14 to apply to the consent defences in s 124(3) would have the effect of enlarging the consent defence and this would conflict with the provision that consent is only to be a defence in the circumstances set out in the subsection. The counter argument is that the matter is one of the construction of s 124. Again *CTM*, can be called in aid. This makes it clear that for the general defence of honest and reasonable mistake to be rebutted, the legislature must make it abundantly plain that mistake is irrelevant. Two features of s 124 could be relied upon to rebut the application of s 14, namely the express provision of a mistaken belief that the other person is 17 in s 124(1) and the provision in s 124(3) that consent is only a defence in the circumstances set out in s 124(3)(a) and (b). Arguably, neither is sufficient to oust s 14 on the demanding standard required by *CTM*. In this context, resort to the common law to assist in interpreting a general principle of criminal responsibility such as s 14 is permitted by the decisions in *Vallance*,<sup>69</sup> *Murray*<sup>70</sup> and *Martin*.<sup>71</sup>

2.2.12 The point of the discussion in the above nine paragraphs is to demonstrate that the scope of the defence of mistake as to age is unclear. An honest and reasonable belief that the young person is over 17 is a defence. But it is unclear whether the consent defence and the general mistake defence in s 14 can be combined to allow a defence of mistaken belief as to the age of the young person in circumstances in which if the belief were true the conduct would be lawful. This ambiguity is relevant because one of the tasks of the Institute is to recommend changes to clarify the law in cases of uncertainty.

## 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 2). 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 that the

<sup>66</sup> *B (A Minor) v DPP* [2000] 2 AC 428, 476.

<sup>67</sup> *R v K* [2001] UKHL 41.

<sup>68</sup> *Ibid* [17] (Lord Bingham), [32] (Lord Steyn).

<sup>69</sup> (1961) 108 CLR 56, 76 (Windeyer J).

<sup>70</sup> [1962] Tas SR 170, 172-175 (Burbury CJ).

<sup>71</sup> [1963] Tas SR 103, 110 (Burbury CJ), 149 (Neasey J).

assault was both unlawful and indecent.<sup>72</sup> ‘Unlawful’ means that the assault was not justified or excused. Whilst in general consent is a defence to an assault,<sup>73</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>74</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 of 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 an inanimate object is guilty of a crime.<sup>75</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.

### ***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 s 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?

Those not interested in the technical detail of the discussion of these questions can skip to Part 2.4. In summary, the 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 consent defence with the general defence mistake defence.

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<sup>72</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>73</sup> Section 182(4).

<sup>74</sup> Section 127(3).

<sup>75</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.

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 para 2.2.10, 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>76</sup> The difference in relation to the onus of proof between mistakes as to age in s124 and s 127 and s 127A is clearly an anomaly.

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 as the *expressio unius* argument has no application.

## 2.4 Indecent act with young person and procuring offences

### *Indecent act with a young person*

2.4.1 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>77</sup> For example, an adult who masturbates in front of child or who invites a child to touch his exposed penis could not be charged with an indecent assault.<sup>78</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*

2.4.2 Three child specific procurement offences were added to the *Code* in 2005 together with offences in relation to child exploitation material.<sup>79</sup> These changes were made in recognition of an

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<sup>76</sup> *Attorney-General's Reference No 1 of 1989, R v Brown* [1990] Tas R 46.

<sup>77</sup> Parliament of Tasmania, *Criminal Code Amendment Bill 2001* (No 1), Second Reading, Minister for Justice and Industrial Relations, Dr Patmore, 28 March 2001, 33.

<sup>78</sup> *Riseley* [1970] Tas SR 41, 46 (Crisp J) citing *Fairclough v Whipp* (1951) 35 Cr App R 138.

<sup>79</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

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>80</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.

## 2.5 Maintaining a sexual relationship with a young person

2.5.1 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 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 the young person was maintained.<sup>81</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*

2.5.2 There is a presumption that Acts of Parliament are intended to operate only within the territorial limits of the jurisdiction.<sup>82</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

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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 128(a) on the grounds that young females were adequately protected by other child specific sexual offences: Law Reform Commission of Tasmania, *Report and Recommendations on Rape and Sexual Offences*, Report No 31 (1982).

<sup>80</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).

<sup>81</sup> *Criminal Code* s 125A(6)(a).

<sup>82</sup> *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 306, 363.

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. 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 sexual 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>83</sup> The inability of the Tasmanian Supreme Court to take into account unlawful sexual acts committed outside the State when dealing with this crime led to Justice Blow's referral of this issue to the Institute.

2.5.3 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 specifically provided for, however, the section is strangely drafted. Subsection (5) provides that it is a defence to the crime to prove that the accused person believed on reasonable grounds that the young person was of or above the age of 17 years. In cases where the unlawful sexual act was sexual intercourse, assault or an indecent act, such a mistake as to age would preclude the individual act from being an unlawful one. 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.

## 2.6 Child pornography offences

2.6.1 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>84</sup>

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<sup>83</sup> *Tasmania v S*, COPS, Blow J, 30 November 2005.

<sup>84</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.



## 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. 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>85</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’. 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>86</sup> In New South Wales and the Australian Capital Territory, where the young person is under the age of 10, liability is absolute.<sup>87</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. In other jurisdictions the no defence age is higher, for example it is 12 in Queensland and Victoria,<sup>88</sup> 13 in Western Australia,<sup>89</sup> 14 in the Northern Territory<sup>90</sup> and 16 in South Australia.<sup>91</sup> Tasmania is therefore the only Australian jurisdiction that does not have a no defence age.<sup>92</sup>

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<sup>85</sup> See footnote 15 above.

<sup>86</sup> See discussion above in 1.3.

<sup>87</sup> *Crimes Act 1900* (NSW) s 66A; *Crimes Act 1900* (ACT) s 55(1).

<sup>88</sup> *Criminal Code* (Qld) s 215; *Crimes Act 1958* (Vic). Neither Victoria nor Queensland have separate offences for sexual penetration of a child under the no consent 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>89</sup> *Criminal Code* (WA) s 320.

<sup>90</sup> *Criminal Code* (NT) ss 127(4), 139A.

<sup>91</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>92</sup> Note that 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’ – 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>93</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 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>94</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>95</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>96</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>97</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>98</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>99</sup> An alternative approach is taken in Canada and New Zealand where the law requires that the accused had made inquiries in relation to age rather than simply requiring that the accused held a reasonable belief.<sup>100</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. 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

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<sup>93</sup> *Crimes Act 1961* (NZ) s 132(4).

<sup>94</sup> *R v G* [2009] 1 AC 92 (HL). In UK terminology this is called strict liability.

<sup>95</sup> *Sexual Offences Act 2003* (UK) s 9(1)(c)(ii) and s 13 (this applies if the perpetrator is under 18).

<sup>96</sup> *Criminal Code* (WA) s 321((9).

<sup>97</sup> Law Reform Commission of Western Australia, above n 50, 93.

<sup>98</sup> No 6 of 1974, s 2.

<sup>99</sup> *Criminal Law Consolidation Act 1935* (SA) s 49.

<sup>100</sup> *Criminal Code* (Can) s 159.1(4); *Crimes Act 1961* (NZ) s 134A.

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>101</sup> reversed its earlier ruling in *Martin's case*<sup>102</sup> and held that in light of the High Court's decision in *He Kaw Teh*, the onus was on the Crown to disprove mistake. When the crime of aggravated sexual assault was inserted in the *Code* as one of 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.

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<sup>101</sup> [1990] Tas R 46.

<sup>102</sup> [1963] Tas R 103.

### ***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 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***

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>103</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 paras 2.2.9 - 2.2.12 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. If the application of a general principle of criminal responsibility such as the mistake defence in s 14 is to be determined in the light, not only of the statute creating the offence, but also in the light of the common law as the authorities on the interpretation of Codes suggest, then the High Court's decision in *CTM* cannot be ignored. It 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>104</sup> Unless there is an indication, which is plain and unambiguous, that such a defence is unavailable, the defence will not be ousted. It could be argued that the point raised is relatively obscure and academic and is unlikely to arise in practice. However, it did arise in *McCabe*. In any event it can be argued that any 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>105</sup>

## **3.4 The age of consent**

3.4.1 The fact that the general age of consent in Tasmania is 17 years, and the general age of consent in all other Australian jurisdictions other than South Australia is 16, raises the question of

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<sup>103</sup> [1980] Tas R 134.

<sup>104</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>105</sup> *Criminal Code* (Can) s 150.1(6).

whether the age of consent should be lowered.<sup>106</sup> It could be argued that to set the age at 17 is unrealistically high given that many adolescents are sexually active before this. Arguably, to fix the age at 17 when most other Australian jurisdictions have set it at 16 constitutes an interference with autonomy and is an infringement of a 16-year-old's right to privacy. However, it should be noted that the age of consent in relation to child pornography is 18 years. This is standard in other Australian jurisdictions and reflects the need to comply with the International Labour Organisation Convention 182, which requires signatories to prohibit the use, procuring or offering of a child under 18 for production of pornography or pornographic performances.<sup>107</sup> It should also be noted that in jurisdictions where the age of consent is 16, the offence proscribing sexual intercourse with a person under 16 may be supplemented with an offence of taking part in an act of sexual penetration with a person aged 16 or 17 who is under his or her care, supervision or authority.<sup>108</sup> This effectively increases the age of consent to 18 in such cases. Formulating policy in relation to sexual conduct involving children is problematic. As discussed earlier, whilst the primary rationale for criminalising such conduct is protecting children from the exploitative sexual conduct of adults, the additional purpose of proscribing the sexual activity of children before they are mature enough to make rational decisions about such matters is also a consideration. While these considerations are primarily about harm, it cannot be denied that issues of morality intrude.

3.4.2 However, it is misleading to consider the general age of consent in isolation without also examining the age similarity consent defences. With these defences in mind, the de facto age of consent in Tasmania is 12, at least where the other person is no more than 3 years older, and the sexual intercourse is not anal intercourse. A relevant consideration in examining the appropriate age of consent is the age at which young people become sexually active. If the purpose of criminalising the sexual conduct of young people is to discourage same or similar age sexual conduct of young people before it is considered that they are mature enough to deal with it, the question as to whether the criminal law is an appropriate way to regulate such conduct arises. One response to the over-reach of the criminal law is that prosecutorial discretion can be used to filter out inappropriate prosecutions. However, relying on such a filter raises issues of equity, discrimination, inconsistency and transparency.

3.4.3 Difficulties have emerged in recent years in relation to the age of consent relating to the production and dissemination of child pornography. When young people use their mobile phones to take intimate images of themselves and send them to friends ('sexting'), they are committing the offences of production of child exploitation material and distributing it, as well as the Commonwealth crime of using a carriage service to distribute child pornography. Unlike the traditional child specific sex offences, no age similarity consent defences apply. Whilst this issue is not a matter for the current project, it demonstrates the problems with trying to formulate appropriate policy in the area.<sup>109</sup>

### ***Reviews of the age of consent elsewhere***

3.4.4 In 1977 the Royal Commission on Human Relationships recommended that the general age of consent should be 15 on the grounds it is a "more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions".<sup>110</sup> The Model Criminal Code Officers Committee (MCCOC) initially recommended a uniform age of consent in Australia of 16 but

<sup>106</sup> Although the age of consent in Queensland is 16 for vaginal penetration but 18 for anal penetration: *Criminal Code* (Qld) ss 208, 210.

<sup>107</sup> Parliament of Tasmania, House of Assembly, Criminal Code Amendment (Child Exploitation) Bill 2005 (No 37) Second Reading, Mrs Jackson, Minister for Justice and Industrial Relations (14 June 2005).

<sup>108</sup> For example: *Crimes Act 1958* (Vic) s 48.

<sup>109</sup> Tasmania Police have produced new protocols dealing with the prosecution of young people for sexting to ensure that the law targets adults who prey on children: ABC News, 5 December 2011.

<sup>110</sup> Royal Commission on Human Relationships, Final Report (AGPS, 1977) vol 5, 210.

responses to the Discussion Paper, while supporting a uniform age, suggested widely different ages, with some suggesting it should be as high as 18. Because it is a matter of intense debate and the issue is a moral as well as a legal one, the Committee decided not to recommend the precise age at which the age of consent should be set in the Model Criminal Code.<sup>111</sup>

3.4.5 In a recent family violence inquiry, the Australian Law Reform Commission and the New South Wales Law Reform Commission recommended that the age of consent be set at 16, that this be uniform within and across jurisdictions, and that no distinction should be made based on gender, sexuality or any other factor.<sup>112</sup> Although somewhat peripheral to the family violence inquiry, the consultation paper had asked for responses to the proposal to set the age of consent at 16. Some stakeholders supported this proposal and others emphasised “the need for provisions to ‘reflect contemporary practices in sexual relations between young people’ provided such relations are consensual.”<sup>113</sup> The Commissions noted the need to strike an appropriate balance between the need to protect vulnerable persons from exploitation, and the need to allow for sexual autonomy and to recognise the realities of sexual behaviour.<sup>114</sup>

### ***The age of consent is outside this project’s scope***

3.4.6 The Institute notes that reassessing the rationales for the age of consent is a complex and controversial issue which should be informed not only by physical development and psychological competence of children to make decisions concerning sexual behaviour but also by the differentially dangerous consequences of sexual behaviour and relationships ‘when things go wrong’ for young people such as pregnancy and acquiring sexually transmitted disease.<sup>115</sup> The impact of age of consent laws on inhibiting girls from seeking contraception, abortion and medical care should also be considered.<sup>116</sup>

3.4.7 The Institute’s view is that it is not necessary to review the age of consent for the purposes of this project. It observes that the general age of consent needs to be viewed along with the age similarity defences to gain more understanding of the age at which the law allows young people to exercise autonomy and freedom of choice in sexual relationships. So, while 17 is the general age of consent in Tasmania for sexual conduct, this is not absolute and below this age choice is constrained in terms of the age of the participants. In fact by reason of the age similarity defences, young people aged 13 to 15 have greater freedom in sexual relationships than their counterparts in New South Wales where not only is same age sexual contact an offence, it is automatically aggravated because it is designated a ‘child sex offence’ and it 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 law – in Ireland for example the age of consent in the *Criminal Law (Sexual Offences) Act 2006* is 17.<sup>117</sup>

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<sup>111</sup> MCCOC, above n 52, 123.

<sup>112</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 25.49.

<sup>113</sup> *Ibid* para 25.43.

<sup>114</sup> *Ibid* para 25.47.

<sup>115</sup> For a discussion of the matters that should inform a review of the age of consent see M Waites, ‘The Age of Consent and Sexual Consent’ in M Cowling and P Reynolds (eds), *Making Sense of Sexual Consent* (Ashgate, 2004) 73-92.

<sup>116</sup> *Ibid* 85.

<sup>117</sup> Defilement of a child under 17 is a crime: *Criminal Law (Sexual Offences) Act 2006* (Ireland), s 3.

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

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

3.5.1 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*

3.5.2 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 if at least three unlawful sexual acts 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 this jurisdiction.<sup>118</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>119</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?*

3.5.3 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>118</sup> Model Criminal Code s 5.2.14(3).

<sup>119</sup> MCCOC, above n 52.

## Part 4

# Options for Reform

## 4.1 Overview

*4.1.1* In Part 3, four possible problems with the current law were identified. 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 there is more than one possible solution. And there are also arguments for preserving the status quo. This part begins with a discussion of ways to close the loopholes in the current law. The following solutions are discussed:

- a no defence age;
- abolishing the defence of mistake as to 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.

In addition, other possible reforms are discussed, 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 mistake as to age, the following option is considered:

- reformulating the mistake as to age defence as an ‘ought to have known’ test.

Finally, reforms to the crime of maintaining a sexual relationship are outlined.

## 4.2 A ‘no defence age’

*4.2.1* As discussed in para 3.1.2, except for Tasmania 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 neither consent nor mistake as to age is 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, 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>120</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*

4.2.2 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 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.

4.2.3 The no defence age position has been defended by Baroness Hale of Richmond in *R v G*:

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>121</sup>

She added that there are many good policy reasons for the law to convey the message that any sort of sexual activity with a child under 16 is an offence, unless in the case of a child who has reached 13, the perpetrator reasonably believed the child was aged 16 or over.<sup>122</sup>

4.2.4 In summary, there are five arguments which are commonly raised in support of no-fault and which can be equally used to support a no defence age. They are:

<sup>120</sup> Sections 4-6. Section 4 proscribed carnal knowledge 'and abuse'. The age of consent was raised to 16 by an amendment in 1910.

<sup>121</sup> [2009] 1 AC 92, 109.

<sup>122</sup> Ibid.

- the need for public protection;
- the difficulty of proving the offence if fault were required;
- the greater deterrent value of a no defence age;
- the moral ambiguity of engaging in sexual conduct with a young person; and
- the seriousness of the harm that is caused by sexual conduct with a young person.

4.2.5 Two counter arguments to a no defence age and their response by advocates of a no defence age can be anticipated. First, the objection that absolute liability would criminalise similar age consensual sexual experimentation between children and adolescents could be responded to by relying upon prosecutorial discretion to decline to prosecute such cases. This is the current situation in Tasmania in relation to sexual conduct between children under the age of 12 years. In theory a twelve-year-old or an eleven-year-old who has sex with a child under 12 could be charged but the DPP would no doubt decline to proceed with the prosecution.<sup>123</sup> A similar solution would be to provide that proceedings against a child cannot be instituted without the consent of the DPP.<sup>124</sup> Qualifying a no defence age with a rule that it does not apply to similar age consensual sexual acts is another response to this counter argument. However, once there are exceptions to it, it is no longer a no defence age.

4.2.6 A second counter argument is that absolute liability has the effect of making ‘innocent’ men criminal. This is partly answered by the argument that any belief that the young person was over the age of consent could be assessed by the judge as a matter of mitigation. It could be argued that when a young person under a certain age engages in sexual acts, it is appropriate that the law has the ability to condemn such harmful behaviour. Those who engage in sexual behaviour with a young person have a duty to ensure that their partner is over the age of consent. The culpability of the offender can be assessed by the judge and allowance made for it in imposing sentence.

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

4.2.7 Elaborating on the two counter arguments above, there are arguments of principle against a no defence age. Opponents will not be satisfied by the response that objections to criminalising inter-adolescent consensual sexual behaviour and to making innocent men criminals can be answered by prosecutorial and sentencing discretion. Whilst absolute liability is commonly regarded as acceptable for regulatory offences which are not truly criminal, it is regarded by criminal law theorists as totally inappropriate for offences which are punishable by imprisonment and particularly for crimes which attract a stigma and public opprobrium. For such crimes, even strict liability (where mistake of fact is open as a defence) can be regarded as inappropriate. The injustice and unfairness which can result from a no defence age is illustrated by the English case of *R v G*.<sup>125</sup> The defendant (‘D’), aged 15, had sexual intercourse with the complainant (‘C’) aged 12. He was charged with the rape of a girl under the age of 13, contrary to the *Sexual Offences Act 2003*, s 5. He pleaded guilty on the basis that she consented and he believed she was 15 (as she had claimed) and on the assumption that all that was required for conviction was proof that he had sexual intercourse with her and that she was in fact under the age of 13. Assuming she did consent, D’s moral culpability was minor. Although D received a lenient sentence (a conditional discharge) he was convicted of a serious crime. There are two related strands of argument against a no defence age which need to be expanded. The first is that

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<sup>123</sup> Such a prosecution would not be in the public interest: see Prosecution Guidelines which refer to factors relevant to the public interest such as age of the offender and victim and the likely outcome of the prosecution: <[http://www.crownlaw.tas.gov.au/dpp/prosecution\\_guidelines](http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines)> accessed 27 March 2012.

<sup>124</sup> For example see *Criminal Law (Sexual Offences) Act 2006* (Ireland) s 3(9). In the UK CPS guidelines mention that it is not in the public interest to prosecute children of similar age in the absence of coercion: Ashworth, above n 40, 344.

<sup>125</sup> [2009] 1 AC 92.

it is contrary to ‘subjectivism’, an approach which also opposes objective fault elements in an offence as well as absolute liability. Arguments against a no defence age have also been placed in a human rights context when absolute liability offences have been challenged on the grounds that they infringe such rights as the right to a fair trial, the right to liberty and the right to privacy.

### ***Subjectivism and a no defence age***

4.2.8 Contemporary criminal law theory strongly favours a subjective approach to criminal liability. A subjective approach requires that conviction for serious offences should require proof that the accused intentionally did the prohibited act (in other words meant to do the act with knowledge of the prohibited circumstances or results) or recklessly did the prohibited act (in other words was aware of the substantial risk of the prohibited circumstances or results). In the context of an offence such as sexual intercourse with a person under the age of 17, this means that unless the accused knew the young person was under 17 or was reckless as to that, he could not be convicted. This is known as the principle of *mens rea*. The foundational arguments for this principle have been explained by Ashworth. 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 respect.<sup>126</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>127</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>128</sup> A no defence age removes the element of fault for the offence of sexual intercourse with a young person.

4.2.9 In the context of child sex offences, the influence of subjectivism can be seen in the decisions in *B v DPP*<sup>129</sup> and *R v K*<sup>130</sup> where the House of Lords read the requirement of knowledge of the child’s age into the offences of indecency with a child under 14 and indecent assault on a girl under 16. In *R v K* Lord Steyn described the presumption of *mens rea* as a ‘constitutional principle’ that is not easily displaced by the language of the statute.<sup>131</sup> In Australia, support for the subjective approach is illustrated by the High Court’s insistence on the strength of the presumption of *mens rea* in *He Kaw Teh*.<sup>132</sup>

4.2.10 For subjectivists, the High Court’s decision in *CTM* did not go far enough. As discussed above (para 2.2.10), the High Court interpreted the offence of sexual intercourse with a young person over the age of 14 but under the age of 16 as incorporating the defence of honest and reasonable mistake as to age. This, it has been argued, is contrary to the fundamental nature of the common law presumption of *mens rea* and is unjustifiable by reference to criminal law theory and the common law.<sup>133</sup> Instead, it has been argued, the High Court should have treated the presumption of *mens rea* as a ‘fundamental presumption’ and found that the offence required proof of knowledge that the young

<sup>126</sup> A Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’ (2010) 45 *Irish Jurist* 1, 5-6; Ashworth, above n 40, 155.

<sup>127</sup> Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’ above n 126, 5-6; Ashworth, above n 40, 155.

<sup>128</sup> Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’ above n 126, 6; Ashworth, above n 40, 63, 171.

<sup>129</sup> [2000] 2 AC 428.

<sup>130</sup> [2002] 1 AC 462, 470 [32].

<sup>131</sup> Lord Steyn, 470.

<sup>132</sup> (1985) 157 CLR 523.

<sup>133</sup> S Hodson, ‘CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea’ (2010) 34 *Criminal Law Journal* 187.

person was under the age of 16.<sup>134</sup> It follows that a pure subjectivist would oppose a no defence age and would be unlikely to be content with an offence which provides for a defence of honest and reasonable mistake as to age rather than proof of knowledge of age.

### ***Is a no defence age an infringement of human rights?***

4.2.11 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>135</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 this Issues Paper. 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>136</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>137</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>138</sup>

4.2.12 In *R v G*, referred to above in para 4.2.7, s 5 of the *Sexual Offences Act 2003* (UK) was challenged on the grounds that it was incompatible with the right to fair trial and the presumption of innocence in art 6 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* because it was an offence of 'strict liability' and that it violated his right to privacy under art 8 because it was disproportionate to charge the appellant with rape under s 5 rather than a less serious charge under s 13. The fair trial argument asserted that creating an offence which failed either to require proof of knowledge that the complainant was under the age of 13 or a defence of reasonable belief that she was over the age of 13 failed the 'reasonable limits' test for strict liability offences laid down in *Salabiaku v France*.<sup>139</sup> This test required a balance between the public interest and the right of the defendant not to be convicted of a criminal offence in the absence of blameworthy conduct which was not satisfied in the case of s 5. The House of Lords held there was no infringement of either art 6(1) or art 6(2). The former guarantees procedural fairness but not the content of the substantive law and the latter is concerned with the presumption of innocence and not with the mental element or the defences available to a criminal offence. Lord Hoffman was dismissive of *Salabiaku v France*, and suggested that it could be ignored because of the difficulty of construing what is meant by reasonable limits:<sup>140</sup> "My Lords, I think that judges and academic writers have picked over the

<sup>134</sup> Hodson argues it should have the status of a quasi-constitutional principle – one of the fundamental presumptions in Spigelman J's Common Law Bill of Rights: *ibid* 191; See also Ashworth, above n 40, 167-170 as to the meaning of a 'constitutional principle' in this context.

<sup>135</sup> See *Australian Law Reform Commission Act 1996*, s 24(1)(a).

<sup>136</sup> J Gans, T Henning, J Hunter and K Warner, *Criminal Process and Human Rights* (Federation Press, 2011) 30.

<sup>137</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>138</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 J Gans et al, above n 136, 26-27.

<sup>139</sup> (1988) 13 EHRR 379.

<sup>140</sup> *R v G* [2009] 1 AC 92, [6] (Lord Hoffman). Lord Hope at [29]-[30] did not agree it could be ignored but agreed that the substantive content of the criminal law did not raise issues of fairness which concerned art 6. Ashworth notes that European authority for applying the presumption of innocence to the substantive law rather than the burden of proof is scanty: See Ashworth, above n 40, 344.

carcass of this unfortunate case so many times in attempts to find some intelligible meat on its bones that the time has come to call a halt.<sup>141</sup>

A violation of the right to privacy under art 8 was dismissed by a majority. Lord Hoffman considered that the right to privacy had nothing to do with the prosecutorial policy or decision making.<sup>142</sup> Baroness Hale considered the offence did not engage the right to privacy because the right does not protect sexual relationships where one of the parties is vulnerable and in need of protection. And even if the right to privacy was engaged, it was not an unjustifiable interference with privacy to label the offence 'rape' or to prosecute the appellant for the s 5 offence rather than the s 13 offence.<sup>143</sup> Lord Mance considered that the right to privacy was engaged but that neither the statutory scheme nor the conviction and sentence of D was an unjustifiable interference with his right to privacy. An appeal to the European Court of Human Rights against the House of Lord's decision was unsuccessful.<sup>144</sup>

4.2.13 In Canada, the crime of sexual intercourse with a female under the age of 14 contrary to s 146 of the *Criminal Code* was successfully challenged in *R v Hess*<sup>145</sup> on the grounds it breached the right to liberty in s 7 of the Charter of Rights. The *Code* expressly provided that neither consent nor a belief that she was 14 or more was a defence to the offence under s 146. A majority of the Supreme Court held that an offence punishable by imprisonment that does not have a due diligence defence infringes the right to liberty enshrined in s 7 and was not justified under s 1 as a reasonable limit on an accused's s 7 rights. Wilson J, who delivered the judgment of the majority said:

The potential benefits flowing from the retention of absolute liability are far too speculative to be able to justify a provision that envisages the possibility of life imprisonment for one who is mentally innocent. At a minimum the provision must provide for a defence of due diligence.<sup>146</sup>

The minority (Gonthier and McLachlin JJ) found that the offence infringed s 7 of the Charter but was saved by s 1 as a reasonable and justifiable intrusion on the right.<sup>147</sup> So the position in Canada is that an offence of absolute liability that is punishable by imprisonment is inconsistent with the Charter in that it may deprive the morally innocent of their right to liberty and this is not justifiable under the values and principles essential to a free and democratic society.

4.2.14 Absolute liability for the crime of sexual intercourse with a young person has also been successfully challenged in Ireland. In *CC v Ireland & ors*<sup>148</sup> a 19-year-old was charged with the crime of having carnal knowledge of a girl under 15 contrary to the *Criminal Law (Amendment) Act 1935*, s 1(1). He admitted consensual sexual intercourse with the girl and said that she told him she was 16 and that she had initiated the contact between them after their first (non-sexual) encounter. The Supreme Court of Ireland held that the offence, which provided no defence of mistake as to age was unconstitutional because it was inconsistent with the applicant's personal rights to liberty and good name in art 40 of the Constitution. Justice Hardiman, who delivered the judgment of the Court, was

<sup>141</sup> *R v G* [2009] 1 AC 92, 97 [6].

<sup>142</sup> *Ibid* 98.

<sup>143</sup> *Ibid* 110.

<sup>144</sup> *G v United Kingdom* [2012] Crim LR 46.

<sup>145</sup> *R v Hess; R v Nguyen* [1990] 2 SCR 906.

<sup>146</sup> *Ibid* [33].

<sup>147</sup> The right to liberty in art 5 of the *European Convention on Human Rights* is more limited by the exceptions to the right which includes lawful detention after conviction. See *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 5. So any conviction by a competent court is lawful without reference to the seriousness of the offence. The *International Covenant on Civil and Political Rights (ICCPR)* is not so limited. See *ICCPR*, opened for signature 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

<sup>148</sup> [2006] 4 IR 1.

unpersuaded by the arguments that such an injustice was tolerable because of the greater good, namely the effectiveness of absolute liability as a deterrent.

4.2.15 In addition to the arguments of principle against absolute liability, it can be argued that a no defence age is not the best way to achieve the object of protecting young people from exploitation and abuse. The mischief that such offences are directed against is primarily the protection of the young from exploitation by adults and older people. When the age disparity between the perpetrator and the young person is not great, the potential for exploitation or abuse is less. Rather than a no defence age, age-related restrictions could be imposed on the defences of mistake as to age which could ensure that persons who are within the same age range as the complainant/child are not criminally responsible but older persons are precluded from relying upon the defence of mistake as to age, at least in relation to children below a certain age. However, this would still mean that for older perpetrators, liability is absolute.

### ***Countering the case for a no defence age***

4.2.16 There are strong counter arguments to a no defence age (dispensing with fault requirements). Ashworth has argued that rather than absolute liability, an offence such as sexual intercourse with a child under 13 should have a fault element of at least negligence. Fairness and rule of law values dictate that there should at least be some element which relates to culpability. He convincingly counters the five arguments, set out in para 4.2.4 which are commonly raised in support of no fault, namely the need for public protection; the difficulty of proving the offence; the greater deterrent value if liability is absolute; the moral ambiguity of engaging in sexual conduct with young people and the seriousness of the harm that is caused by sexual conduct with young persons.

4.2.17 Ashworth argues that the need for public protection (in this case protection of children) is unconvincing because it knows no limits. Many offences such as offences against the person are there to provide protection to the public yet the principles of *mens rea* apply to them and the argument that fault requirements should be dispensed with is not accepted.<sup>149</sup> It follows that public protection alone is not a sufficient justification for dispensing with fault. In any event, it assumes that public protection will be enhanced by an offence which can be established without proof of fault. This can be challenged by questioning the effectiveness of general deterrence and is considered below (see 4.2.19).

4.2.18 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>150</sup> A flaw in the difficulty of disproving mistake as a justification 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 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

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<sup>149</sup> Ashworth, 'Should strict criminal liability be removed for all imprisonable offences?', above n 126, 9-10.

<sup>150</sup> Ashworth, above n 40, 10.

never be sufficient ground for excluding from inquiry the most fundamental element of a rational and humane criminal code.<sup>151</sup>

4.2.19 The third argument is that the crime will have greater deterrent effect if there is no fault element (*mens rea*) in relation to age; people will realise that they should steer clear of anything to do with sexual activity with young people for fear of incurring a criminal conviction and punishment. Ashworth cautions against readily accepting the deterrence argument and argues that the question is whether dispensing with fault requirements in relation to the age element will have a greater deterrent effect than imposing a negligence requirement. He makes three points against deterrence.<sup>152</sup> First, deterrence assumes rational choice by an actor which is absent if a person can be convicted without advertent to the matter of the age of the young person. In other words, if you believe you are acting lawfully and do not have the opportunity to weigh up the risk of detection and punishment, how can you be deterred?<sup>153</sup> Secondly, evidence to support either the general or specific deterrence hypothesis is lacking.<sup>154</sup> And thirdly, even if it were established that dispensing with fault would have a greater general deterrent effect, there is the moral objection to making a scapegoat of a person in an attempt to discourage others: “such an approach would perpetrate unfairness, by convicting innocent people in the hope of deterring others”.<sup>155</sup> “It is to use the innocent as a means to an end”.<sup>156</sup>

4.2.20 The fourth argument is 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>157</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>158</sup> It is the point that Baroness Hale makes in the quote in para 4.2.3 although her comments can also be interpreted as a deterrence argument – encouraging desistance unless the age of the young person is known for certain. Ashworth rejects the thin ice argument. His point is that 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>159</sup>

4.2.21 The final argument in favour of a no fault element in relation to age is that the public protection argument is strengthened by the seriousness of the harm that may be done by these offences. Ashworth acknowledges that the seriousness of the harm is a proper concern but he argues, using the stigma of conviction carried by the 15-year-old boy in *G* as an example, that the seriousness

<sup>151</sup> (1937) 59 CLR 279, 309.

<sup>152</sup> Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’, above n 126, 11.

<sup>153</sup> There is a counter argument to this: engaging in sexual conduct with a young person is a rational choice, if this risks a criminal conviction, would it not encourage desistance even if reasonable care would not exonerate me? To put the point differently, in the case of sex with a young person, their age is likely to be advertent to. The characteristics of the young person are central. It is not like hiring a car or going to the hairdresser.

<sup>154</sup> This point was also made by Wilson J in *R v Hess* [1990] 2 SCR 906, 923.

<sup>155</sup> Ashworth, above n 40, 11-12. But the principled moral arguments against general deterrence do not have much political (or judicial) acceptance. Nor do the empirical arguments for that matter.

<sup>156</sup> *R v Hess* [1990] 2 SCR 906, [24] (Wilson J).

<sup>157</sup> Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’, above n 126, 12-13. He also discusses the thin ice principle in Ashworth, above n 40, 63.

<sup>158</sup> *Ibid* quoting Lord Morris in *Kneller v DPP* [1973] AC 435.

<sup>159</sup> Ashworth, ‘Should strict criminal liability be removed for all imprisonable offences?’, above n 126, 14.

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>160</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).

### ***Is a no defence age defensible?***

4.2.22 Despite the arguments of principle against a no defence age, the no defence age may nevertheless be defensible. It should be noted that despite the MCCOC’s strong commitment to subjective fault elements for serious offences,<sup>161</sup> it did recommend a no defence age. In the case of the Model Criminal Code this is achieved by creating separate offences for sexual penetration of a child under the no defence age and over the no defence age with different maximum penalties and a provision which expressly provides that absolute liability applies in relation to the circumstances of the child being under the no defence age.<sup>162</sup> The same model was suggested for other sexual crimes committed against or with children. The above discussion demonstrates that there are strong principled arguments against a no defence age. It is clearly unjust if no form of due diligence can give rise to a defence even where a defendant has been positively and convincingly misled. The requirement of mental guilt before conviction for a serious offence is a central value in a civilised criminal justice system. Will the injustice of conviction lead to cynicism and disrespect for the law?<sup>163</sup> Arguably not, if the end justifies the means. But does the end (the protection of young people from engaging in sexual intercourse) justify the means (liability without fault)? This largely comes back to the deterrence argument. As explained above (in para 4.2.18) Ashworth doubts that absolute liability will have a greater deterrent effect than imposing liability for an absence of reasonable mistake of fact or due diligence. Wilson J in *R v Hess* agrees:

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>164</sup>

4.2.23 However, deterrence does have intuitive appeal and it is popular with judges and policy makers, who are inclined to embrace it despite a lack of evidence to support its efficacy. In her dissenting judgment in *R v Hess*, McLachlin J was convinced of the deterrent effect of making liability absolute for the offence of sexual intercourse with a female under 14:<sup>165</sup>

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

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<sup>160</sup> Ibid.

<sup>161</sup> MCCOC, above n 52, 75-79, 83-85.

<sup>162</sup> Model Criminal Code, ss 5.2.11(1), 5.2.18; see MCCOC, above n 52, 124, 154.

<sup>163</sup> This was one of the questions posed by Dickson J in assessing arguments for and against absolute liability in *R v Sault Ste. Marie* [1978] 2 SCR 1299.

<sup>164</sup> [1990] 2 SCR 906, [24]-[26].

<sup>165</sup> Ibid [110].



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.

Her argument is that if criminal liability for sexual intercourse with young person is absolute, fear of being wrong about a young person’s age will lead some men who are contemplating having sex with a young person to desist. The age of a young person with whom one is contemplating intercourse is likely to be a matter to which one addresses attention. To avoid the risk of conviction, one may refrain from having sex with girls less than adult age unless one knows for certain they are over the age of consent. To use an analogy with speeding, if I know my speedometer is broken, I may refrain from taking my car on a long trip for fear that I may exceed the speed limit. McLachlin J’s argument for a deterrent effect derived from the need to avoid ‘jail bait’ failed to convince Hardiman J in the Irish case *CC v Ireland*.<sup>166</sup>

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.

General deterrence depends for its effectiveness on knowledge that the conduct is forbidden. Where there is a no defence age is this common knowledge? Is there community awareness of the age of consent to sexual intercourse?

4.2.24 Irrespective of deterrence, some may support a no defence age 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, will be guilty of a serious crime. Moreover, evidence is lacking that a no defence age will be effective in preventing sexual exploitation of young people. 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 and any injustice will have to be addressed at the sentencing stage.

4.2.25 If a no defence age is accepted, there is an issue as to what this age should be. The MCCOC suggested a no defence age of 10 years in the Discussion Paper, “influenced to some degree by the fact that the age of criminal responsibility in the Model Criminal Code is 10 years”.<sup>167</sup> As the responses to the MCCOC discussion paper indicate, opinions differ widely as to what the age should be. Respondents who disagreed with 10 years as the appropriate age, suggested instead 12, 14 and even 16.<sup>168</sup> The question of whether or not a no defence age, if introduced, should not apply to young defendants, is canvassed in the next section.

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<sup>166</sup> [2006] 4 IR 1, 84.

<sup>167</sup> MCCOC, above n 52, 126-127.

<sup>168</sup> *Ibid.*

**Question 1**

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

### 4.3 The mistake as to age defence

4.3.1 There are a number of reform options in relation to mistake as to age as a defence to child sexual offences. The first is that there should be no such defence. This would mean that the mistake as to age defence in s 124(2), s 125B(2), s 125C(5) and s 125D(5) would be omitted and for each offence there would be a provision which expressly provides that mistake as to age is not a defence, thereby making it clear that the general mistake defence in s 14 is unavailable. The alternative is to retain the defence. Retaining it leaves a number of possible options for the operation and scope of the defence:

- that an *honest belief* that the young person is over the age of consent is a defence (this is the position in the *Criminal Code* (Cth) s 272.16;
- an unrestricted defence of *honest and reasonable* belief that the young person is over the age of consent (the current Tasmanian position);
- that the defence of mistake as to age be limited by a no defence age;
- offender age limitations on the defence of mistake as to age; or
- other restrictions on the defence of mistake as to age.

The onus of proof in relation to mistake is considered below in Part 4.4. A different test of criminal responsibility which does not require the existence of an honest belief that the young person was under age to escape criminal responsibility is to require the prosecution to prove the accused knew or ought to have known that the young person was under age. This option is discussed in Part 4.5. The option of limiting mistakes as to age (and marriage) by a no defence age has been discussed above (see Part 4.2). As explained, some jurisdictions limit the defence of mistake as to age by a no defence age of 10 (New South Wales and the Australian Capital Territory), 12 (Victoria and Queensland), 13 (Western Australia) or 14 (Northern Territory). In South Australia, the defence of mistake as to age is limited to a case where the complainant is 16. This, in effect means that the no defence age is 16 in South Australia. The other options are discussed below beginning with the option of ousting the defence of mistake as to age entirely.

#### *No mistake as to age defence*

4.3.2 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>169</sup> The National Association for the 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>170</sup>

<sup>169</sup> ALRC and NSWLRC, above n 112, para 25.46 quoting the Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

<sup>170</sup> *Ibid* quoting the NASASV, *Submission FV195*, 25 June 2010.

4.3.3 Against the argument that there should be no mistake as to age defence, it can be argued that the interests of justice require that some form of defence of mistake as to age be available in addition to the age similarity consent defences. As the MCCOC has argued, it would be wrong to automatically punish as a sexual offender against children a person who believed that he or she is having sexual contact with an adult and therefore is doing nothing legally or morally wrong.<sup>171</sup> While the need to recognise the particular vulnerability of children and the social need to protect them from abuse and exploitation could be said to justify a no defence age of 12 or so, when the child is older, there is a strong argument that the interests of justice require a mistake as to age defence in at least some circumstances. In South Australia, the defence of mistake as to age is limited to a case where the complainant is 16 and the defendant believed that he or she was 17, this, in effect, means that the no defence age is 16 in South Australia. Arguably this is too restrictive.

4.3.4 Another possibility is 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).

#### Question 2

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

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

4.3.5 The Commonwealth *Criminal Code* 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) and in this case the mistake need only be an honest one.<sup>172</sup> This is achieved in the following way. Section 272.8(4) provides that absolute liability applies in relation to the element that the child is under the age of 16.<sup>173</sup> 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>174</sup> Section 272.16 expressly provides for the defence of mistake as to age. The legal burden is on the defence to prove that he or she believed that the child was at least 16.<sup>175</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>176</sup> So whilst the offence is one of absolute liability in relation to age, this is ameliorated by the belief about age defence.

<sup>171</sup> MCCOC, above n 52, 159.

<sup>172</sup> *Criminal Code* (Cth) ss 272.8(1) and 272.16(1).

<sup>173</sup> The belief need only be an honest belief. 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>174</sup> *Criminal Code* (Cth) s 6.2(3).

<sup>175</sup> *Criminal Code* (Cth) s 272.16(1) and s 13.4(b).

<sup>176</sup> *Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010, Explanatory Memorandum*, 16.

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 which requires the defendant's mistake be a reasonable mistake as well as a genuine one. Therefore, not only would the honest mistake formulation be anomalous in the Tasmanian *Criminal Code* context, it may also be less protective. The contrary argument is that a more subjective approach to guilt is fairer to a defendant who otherwise may be punished for a serious offence for doing something that was believed to be lawful.

### Question 3

Assuming you favour retaining the defence of mistake as to age, would you prefer that the defence of mistake as to age be based on an honest belief (the *Criminal Code* (Cth) s 272.16 formulation) or that the mistaken belief be required to be both honest and reasonable (the current Tasmanian position)?

### ***An unrestricted defence of honest and reasonable belief that the young person is over the age of consent***

4.3.6 The only restrictions on the defence of mistake as to age in Tasmania is that the defence 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. Excluding the Commonwealth offence of sexual intercourse with a child outside Australia, Tasmania is the only Australian jurisdiction which has an unrestricted mistake as to age defence. Apart from a no defence age which precludes the defence if the complainant is below that age, some jurisdictions have placed restrictions on the mistake defence. There are various kinds of restrictions including age restrictions relating to the age of the perpetrator and the young person as well as alternative approaches which purport to be stronger than that the belief be both honest and reasonable.

### ***Age restrictions on perpetrators***

4.3.7 As explained in para 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.

4.3.8 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. Sex between a 15-year-old and a 21-year-old would be a crime. Such an outcome is arguably too draconian and would catch too many relationships which are neither exploitative nor abusive. Protecting young people from themselves can be taken too far. This is not to say that a restriction on the defence to perpetrators who are not significantly older than the young person should not be considered. The defence could be limited to perpetrators under the age of 25 or older. The aim of such a provision would be to encourage all who engage in sexual activity with a young person to make genuine efforts to ensure their sexual partner is over the age of consent. Given that age disparity is one way of measuring relative exploitation and harm, denying the mistake defence to older perpetrators may be a justifiable means of achieving this.

4.3.9 The same arguments that have been canvassed against absolute liability above in Part 4.2 also apply here. It can also be argued that an age limit of 20 (or 25) for perpetrators is arbitrary and would operate to deny the defence to a person one day over 21 (or 25). In a debate in the New Zealand Parliament an amendment removing that age restriction on perpetrators was applauded on the grounds that, “[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.”<sup>177</sup>

#### Question 4

(a) Should there be an age restriction on the age of the perpetrator who can claim the defence of mistake as to age?

(b) If yes, what should that age be?

#### *Alternative approaches*

4.3.10 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>178</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 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>179</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 took and that those steps were all that could have been reasonably required of him in the circumstances.<sup>180</sup> What is reasonable will depend on the circumstances and in some cases a visual observation may suffice.<sup>181</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>182</sup>

4.3.11 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>183</sup> The defence is not available in relation to sexual conduct with a child under 12.<sup>184</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:

<sup>177</sup> Parliamentary Debates, New Zealand, *Crimes Amendment Bill (No 2)*, Second Reading, Marc Alexander, 12 April 2005.

<sup>178</sup> *Criminal Code* (Can) s 150.1(4).

<sup>179</sup> *R v P (LT)* (1997) 113 CCC (3d) 42, [19].

<sup>180</sup> *R v Osborne* (1992) 17 CR (4<sup>th</sup>) 350.

<sup>181</sup> *R v P (LT)* (1997) 113 CCC (3d) 42, [20].

<sup>182</sup> *Ibid* [18].

<sup>183</sup> *Crimes Act 1961* (NZ) s 134A.

<sup>184</sup> *Ibid* s 132(4).

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>185</sup>

4.3.12 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>186</sup> According to Justice L’Heureux-Dube in *R v Ewanchuk*<sup>187</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.

4.3.13 A different approach was suggested by the South African Law Commission. It 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>188</sup> This recommendation was implemented in 2007, although the provision expressly placing the onus on the accused was omitted.<sup>189</sup> This may have been due to the Constitutional Court’s apparent disapproval of reverse onuses.<sup>190</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 perpetrator from inquiring further.

4.3.14 An advantage of the New Zealand approach is that it can be easily accommodated within the existing principles of criminal responsibility. A similar defence is provided in s 9(4) of the *Sex Industry Offences Act 2005*. The South African provision 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. The Canadian provision is formulated to fit in with the way in which principles of criminal responsibility have developed under the Charter and the provision does not fit as neatly and clearly with Tasmanian principles of criminal responsibility. Like the reasonable steps requirement for mistake as to consent in cases of sexual assault, it combines subjective and objective fault elements in a way which is familiar to Canadian criminal lawyers but rather foreign to Tasmanian law.

#### Question 5

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

<sup>185</sup> Parliamentary Debates, New Zealand, *Crimes Amendment Bill (No 2)*, Second Reading, 12 April 2005.

<sup>186</sup> Roach, above n 39, 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>187</sup> [1999] 1 SCR 330, [99].

<sup>188</sup> South African Law Commission, *Sexual Offences*, Report, Project 107 (2002) 68.

<sup>189</sup> *Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007* (South Africa) s 56(2)(a).

<sup>190</sup> South African Law Commission, above n 188, 62.

### *Clarifying the scope of the defence*

4.3.15 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 remains and 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 consent and mistake as to age defences. This is the position in Canada. It 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.

#### **Question 6**

Should the *Code* explicitly allow an accused person to combine the mistake as to age and consent defences (for a further explanation see 2.2.3)?

## **4.4 A uniform onus of proof for mistake as to age**

4.4.1 Whether or not a no defence age is accepted, there is an issue as to who should bear the onus of proof on the issue of mistake as to age where that defence is available as a matter of law. The current legal position (see Part 3.2) 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>191</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 of the proof 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>192</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>193</sup>

4.4.2 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 argument. 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>194</sup>

<sup>191</sup> See table in Appendix 3 for provisions in other jurisdictions.

<sup>192</sup> *CTM* (2008) 236 CLR 440.

<sup>193</sup> *Re Attorney-General’s Reference, No 1 of 1989, R v Brown* [1990] Tas R 46.

<sup>194</sup> Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Final Report (2004) 454.

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>195</sup>

4.4.3 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>196</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>197</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>198</sup> Section 272.16 expressly provides the defence of mistake as to age. The legal burden is on the defence to prove that he or she believed that the child was at least 16.<sup>199</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>200</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>201</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 defendant’s own knowledge, so according to this argument he or she should have to disprove it. This, of course is contrary to the fundamental principle in *Woolmington’s case* that it is for the prosecution to prove the elements of the offence including *mens rea* elements.

4.4.4 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>202</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. As described above (see para 1.1.13), the jury were 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, 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.

4.4.5 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

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<sup>195</sup> No 2/2006 s 9(1).

<sup>196</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>197</sup> The belief need only be an honest belief. The defence of honest and reasonable mistake of fact under s 9.2 of the *Code* (with an evidentiary onus on the accused by the legal burden of proof on the prosecution) makes an offence one of strict liability.

<sup>198</sup> *Criminal Code* (Cth) s 6.2(3).

<sup>199</sup> *Criminal Code* (Cth) s 272.16(1) and s 13.4(b).

<sup>200</sup> *Crimes Legislation Amendment (Sexual Offences against Children) Bill 2010*, Explanatory Memorandum, 16.

<sup>201</sup> *Ibid* 36.

<sup>202</sup> Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper (2001) 90-91.



just after the complainant arrived at the defendant's house. This act lasted "quite a time".<sup>203</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>204</sup> The jury may have differentiated the two counts on the basis that by the time she performed oral sex on him 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. The jury may simply have been unsure as to whether he should have known she was underage at the time of the first act, but 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.

4.4.6 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 decision of the High Court in *He Kaw Teh*.<sup>205</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>206</sup> if the incursion into the presumption of innocence cannot be justified. As decisions such as *R v Momcilovic*<sup>207</sup> and *R v Oakes*<sup>208</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 art 14(2).<sup>209</sup>

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

4.4.7 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>210</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;
- the nature and extent of the limitation;

<sup>203</sup> *Tasmania v Martin*, COPS, Porter J, 29 November 2011.

<sup>204</sup> *Ibid*.

<sup>205</sup> (1985) 157 CLR 523.

<sup>206</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>207</sup> [2010] VSCA 50; 25 VR 436.

<sup>208</sup> [1986] 1 SCR 103.

<sup>209</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>210</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 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>211</sup>

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>212</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>213</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 persuasive to evidentiary onus would make much difference to the effective prosecution of the offence(s).

#### Question 7

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

## 4.5 Reformulating the mistake defence as an ‘ought to have known’ test

*4.5.1* As explained in Part 2.6, the child pornography offences in the *Code* are formulated in a different way 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.

### *The meaning of ‘ought to have known’*

*4.5.2* Apart from the child pornography offences, there is at least one other provision in the *Criminal Code* which uses the ‘knew or ought to have known’ mental element. Murder can be established in a number of ways. One possibility is if the prosecution proves that the accused caused death by means of an unlawful act, which he or she knew or ought to have known to be likely to cause death.<sup>214</sup> This provision (s 157(1)(c)) was considered by the High Court in *Boughey*,<sup>215</sup> a case in which

<sup>211</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

<sup>212</sup> *R v Oakes* [1986] 1 SCR 103, 119 (Dickson CJ).

<sup>213</sup> As to this see *R v Momcilovic* (2010) 25 VR 436, [140] and *HKSAR v Hung Chan Wa* (2006) HKCFAR 614, 646.

<sup>214</sup> *Criminal Code* s 157(1)(c).

murder was put to the jury on the basis that as a doctor, the accused knew or ought to have known that pressing his sexual partner's carotid artery was an act which he either knew or ought to have known to be likely to cause death. Mason, Wilson and Brennan JJ explained s 157(1)(c) as follows:

The words 'ought to have known' are included in s 157(1)(c) as an alternative to 'knew'. Reliance upon them is necessary only in a case where it is not positively established that an accused actually knew that his act was likely to cause death. That does not however, mean that the content of the knowledge laid at the door of an accused is to be assessed by reference to the notional knowledge and capacity of some hypothetical person. The starting point of the inquiry on the question whether an accused ought to have known that his or her actions were likely to cause death must be the knowledge, intelligence and, where relevant, the expertise which the particular accused actually possessed. The relevant question is not whether some hypothetical reasonable person in the position of the accused would have appreciated the likely consequences of the applicant's act. It is what that particular accused, with his or her actual knowledge or capacity, ought to have known in the circumstances in which he or she was placed.<sup>216</sup>

And later they added:

As we have indicated the words 'ought to have known' in s 157(1)(c) should be understood as referring to what an accused person would have known if he or she had stopped to think to the extent that he or she ought to have. They do not refer to what an accused would have found out if he or she had taken the trouble to read a book or inquire of others.<sup>217</sup>

### ***Is the 'ought to have known' test appropriate for sexual intercourse with a young person?***

The use of a partly objective mental element for murder is controversial and has been criticised as an inappropriate test for such a serious crime. It is based upon s 174(d) of the Draft Code of 1879<sup>218</sup> of which *Russell on Crime* says, the 'Janus like definition of murder based on mutually incompatible principles is illogical and unsatisfactory in practice'.<sup>219</sup> For this reason the 'ought to have known' test is rare in modern statutory definitions of murder. However, this does not mean that it is inappropriate in other contexts such as sexual intercourse with a young person and child sexual assault. As the quotation from *Boughey's case* indicates, the test can be a more demanding test than that of the hypothetical reasonable man or less demanding depending on the intelligence and experience of the accused.<sup>220</sup> If the *Code* was amended to adopt the 'ought to have known' test for child sex offences, it would mean that the definition of the crime of sexual intercourse with a young person would expressly provide that the perpetrator knew or ought to have known that the young person was under the age of 17. An advantage of adopting this test would be that it would mean that there would be consistency between the age element test between the child sexual assault offences and the child pornography offences (although the age itself would be different). This would simplify the law.

While a uniform treatment of the element of age in child sex offences would be an advantage, it is important to ask if the 'ought to have known' test achieves 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. Using the interpretation of 'ought to have known' from *Boughey's*

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<sup>215</sup> (1986) 65 ALR 609.

<sup>216</sup> *Boughey* (1986) 65 ALR 609, 622.

<sup>217</sup> *Ibid* 623.

<sup>218</sup> *Report of the Royal Commission to consider the law relating to indictable offences*, 1878.

<sup>219</sup> J W C Turner, *Russell on Crime* (Stevens & Sons, 12<sup>th</sup> ed, 1964) 495.

<sup>220</sup> This is well illustrated by the applicant's rather ingenious argument in *Boughey* that, while as a doctor it might be said he ought to have known death was likely (so s 157(1)(c) was satisfied), death was unintended, unforeseen by him and unforeseeable by a reasonable person leaving open the defence of accident or chance event under the second limb of s 13(1). Another example of where the test could be less demanding is if the accused were blind.

case, arguably not. It 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>221</sup> In comparison with the New Zealand and Canadian tests which require the accused to take (all) reasonable steps to ascertain the complainant’s age, this sets the bar too low.

**Question 8**

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

## 4.6 Amending the offence of maintaining a sexual relationship

4.6.1 One avenue to address the anomalies and problems associated with the mistake as to age defence for this crime 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 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.

4.6.2 The arguments set down in para 3.5.2 suggest that this offence should be amended so that, provided at least one of the sexual acts is committed in Tasmania, unlawful sexual acts committed outside Tasmania can be taken into account.

4.6.3 It can be argued that 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 (see 3.5.3).

**Question 9**

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

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<sup>221</sup> *Boughey* (1986) 65 ALR 609, 623 (Mason, Wilson and Brennan J).

# Appendix 1

## OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

### INTERNAL MEMORANDUM

File No: 27013

14 September 2010

**TO: Tim Ellis SC**

**FROM: Daryl Coates SC**

Assistant Commissioner Tilyard has written requesting advice as to whether anyone else should be charged with having unlawful sexual intercourse with the abovenamed.

The facts are as follows:

In July 2009 (M) lived in (\_\_\_\_\_), which included the complainant, (C), whose date of birth is (\_\_\_\_\_), and her (\_\_\_) year old sister, (S).

(M) became close friends with Gary Devine who lived at (Z) Street, Glenorchy. They would see each other on a daily basis. Devine knew the complainant was only 12 years of age.

On 20 August 2009, Devine, (M) and the complainant were at (M)'s residence. At some stage, (M) was complaining about not having enough money and that somebody had taken \$20 from her purse. Devine then stated that they could make some money out of prostitution. It was then agreed between the three of them that the complainant would become a prostitute.

The following day, Devine wrote out an advertisement. The complainant was advertised as "Angela 18 years old, and new in town" and a phone number was given. (M) then drove Devine and the complainant to the Glenorchy Central Newsagency where Devine placed the advertisement in the paper and paid for it.

Devine had the advertisement in the paper on 22 August 2009. He subsequently went back on at least two or more occasions and placed advertisements offering the complainant's services. The advertisement appeared in The Mercury newspaper on 22 August 2009, and 3, 4, 6, 11 and 17 September 2009.

(M) subsequently booked the Mid City Hotel. Devine, (M) and the complainant then went to the Mid City Hotel.

The complainant saw many clients over a two-day period and had sexual intercourse with them. Devine would interrupt and tell them when their time was up. The complainant estimated that over the two days at the hotel she earned \$2,000.00. She gave the accused \$100, her mother \$400 and the remainder of the money she spent on drugs which she gave to her mother.

After this occasion at the hotel it was decided the complainant would work at Devine's residence in (Z) Street, Glenorchy. This occurred for approximately the next month where

the complainant worked mainly from Thursday to Sunday. Over the four-week period the complainant saw in excess of 100 people whom she had sexual intercourse with, always at Devine's residence, except on one occasion when she went to (X)'s residence for approximately (time).

In early October 2009, a Police investigation was launched as a result of police being notified by the Child Protection Authority. Statements were obtained from the complainant and her sister. A number of 'clients' were found from telephone records and statutory declarations were obtained from them. This decision was made by Police in an effort to obtain evidence against Devine and (M). At that stage, there was no video recorded interviews with the exception of (X), whose situation was different in that

(\_\_\_\_\_). He was subsequently charged (\_\_\_\_\_).

(Then Crown Counsel) Catherine Rheinberger subsequently gave advice in respect of the others that if the other clients were only there a brief time in a darkened room then, given that the complainant does look much older than her 12 years, they may have a defence. In any event, at that stage these people had not been interviewed on video and therefore any statements they made to Police were inadmissible and no identification evidence had been obtained from the complainant.

Since then Police have identified through telephone records 205 people who may have had contact with the complainant. Many people have either denied calling and state somebody else had access to their telephones or stated they telephoned the number but never went to (Z) Street.

Nineteen people have admitted to Police to some form of sexual activity with the complainant. However, of those 19 people only seven people would agree to be interviewed on video. In total, 12 people were interviewed on video with five denying any sexual activity.

Firstly, in relation to the people who have admitted to Police to having sexual intercourse with the complainant but who have refused to be interviewed, such admissions would be likely to be inadmissible – see s 85A of the *Evidence Act 2001*. Some admissions would appear, in any event, to have been given in statutory declarations on the basis that they would not be used in evidence. Police have approached the complainant and her father in order to see whether she would be involved either in identification parades or trying to identify suspects by photographs. She has told Police that she is unable to identify any suspects and has refused to participate in any identification procedure. In any event, given the sheer number of people the complainant has had intercourse with, any such identification would be of doubtful probative value, as it would be difficult to rely on her identification as actually a person she had sex with as distinct from a person she may have seen in the street. However, as she has refused to participate, this is not an issue. Thus, apart from the people who have admitted to having sexual intercourse with the complainant in a video interview, there is no admissible evidence against any other suspects.

In respect to the seven people who have admitted having sexual intercourse, the following is a summary of their evidence:

**(Male 1)**, DOB \_\_\_\_/1960

- He responded to an advertisement in The Mercury newspaper on 3 and 4 September. He was at (\_\_\_\_\_) when he made the first call.
- He does not remember the telephone conversation. He used his mobile phone.
- He was directed to the units in (Z) Street, Glenorchy. When he arrived at the units he was required to phone the number again.
- He parked his car in the car park and entered the unit.
- The door was answered by a female dressed in bra, pants and skirt. There was another female, plumpish in appearance, aged in her thirties, who was seated on the lounge.
- He entered the bedroom with the first female and paid her \$100 for sexual intercourse.
- After participating in some foreplay, he had sexual intercourse with the female which lasted about 15 minutes. He used a condom.
- The female advised him that she was 20 years of age. He believed that she was that age.
- He believed that people had to be 18 years old to place advertisements in the Adult column of the newspaper.
- The female commented on the large amount of money that she earned from prostitution over the last couple of days.
- He did not believe that the female was affected by drugs or alcohol.
- He believed that he had sexual intercourse with a consenting adult female.
- He drew a diagram of the unit which he signed and dated.

**(Male 2)**, DOB \_\_\_\_/1970

- He telephone a prostitute whose phone number he obtained from an advertisement in The Mercury newspaper.
- He drove to the units situated near a telephone box just up from the roundabout in (Z) Street, Glenorchy.
- He went to a unit situated on the left side of the complex. On his arrival there was a male standing outside the unit smoking. The male indicated for him to enter the unit. He described the male as about 50 years, stocky with short hair.
- He entered the unit. He described the girl present as being slim with long, light brown hair.
- He was advised that the cost of sexual intercourse was \$80. He handed the male \$80 cash.

- He then entered the bedroom with the girl. He had sexual intercourse with the girl which lasted about a minute. He wore a condom and he ejaculated. He then dressed and left the unit.
- He said it was dark inside the unit and the curtains in the bedroom were drawn. There were no lights on.
- He stated that he was shocked and thought it was disgusting on being advised of the true age of the girl.

**(Male 3)**, DOB \_\_\_\_\_/1977

- He was shown telephone records relating to calls made from his telephone to a prostitute's mobile phone. He did not remember the calls, however, he did not doubt the accuracy of the calls.
- In early September 2009, he answered an advertisement in The Mercury newspaper adult section. He rang the mobile number several times until he managed to make contact. The ad stated that it was an 18 year old female called Angela. When he made contact he was directed to a block of units in (Z) Street, Glenorchy. When he arrived at the address he again called the number as he was instructed to do. He was told to wait, however, he left as he was running out of time.
- He called the number again over the following week. He was again told to go to the units at (Z) Street. He went to the front door of the unit and was met by the prostitute. As he entered the front door he saw a male go out the back of the unit. He followed the girl into the bedroom. He gave the girl \$50 and they agreed to 15 minutes of sex. She gave him a condom to use. The girl told him that she was 19 years old and lived (\_\_\_\_\_). She appeared to be confident and sexually experienced. He believed she was about 18 years old.
- As he went to leave the unit he saw a male on a couch in the lounge room. He described the male as of average height, medium to strong build, tanned or olive complexion, very short hair and had a very intent or dangerous look in his eyes. He had a lot of older style tattoos on the top and outside of his forearms. He was in his late thirties to early forties, had weathered skin on his face and had a chiselled/ definitive jaw line. He looked like a member of the Devine family.
- The following week he rang back twice to have sexual intercourse with the female. He does not remember the dates, however, he followed the same procedure as he did on the first occasion.
- On his second visit to the same unit at (Z) Street, the same male was present in the unit. Also in the kitchen was another girl who was a bit chubby. The prostitute was wearing the same clothes as on the first visit. He again paid her \$50 for sexual intercourse.
- On the third visit he again paid the same girl \$50 for sexual intercourse. The same male was present in the unit.
- On each occasion that he visited the prostitute he saw other males either leaving or approaching the unit.



**(Male 4)**, DOB \_\_\_\_\_/1985

He admitted to oral sex being performed on him at Mid City Hotel but denies knowing the age of the girl. This suspect indicated that he was of the belief the girl was of legal age. He responded to an advertisement in The Mercury newspaper which stated the girl was aged 18 years.

**(Male 5)**, DOB \_\_\_\_\_/1978

(Male 5) appeared to be intellectually challenged. He stated that he had attended (Z) Street, Glenorchy, however he could not recall on what day. He said that he only had \$50 and was given a 'hand job' and ejaculated onto a towel. He believed that the complainant looked to be at least 18 years. He identified a male and female who were most likely Gary Devine and (M).

**(Male 6)**, DOB \_\_\_\_\_/1991

(Male 6) admitted to sexual intercourse with the complainant at a party at (\_\_\_\_\_) in late September 2009. This occurred when the complainant climbed into bed with him. The complainant and her girlfriend both told (Male 6) that the complainant was aged 17 years. Sexual intercourse occurred on one occasion only. He believed that she was aged 17 years. He became aware on 18 October 2009 that the complainant was aged 12 years. His version of events is corroborated by SMS messages in that they support the fact that he believed she was 17 years. He ceased having contact with her when he found out her true age.

**(Male 7)**, DOB \_\_\_\_\_/1985

- (Male 7) was initially contacted by telephone and he admitted attending Devine's unit, probably on 4 September 2009.
- He was met by the complainant. He described the units at (Z) Street and gave a brief description of Devine's unit.
- He described Devine being present. He paid \$100, stayed about 10 minutes and had sexual intercourse with the complainant.
- He gave the cash to the complainant. He described her as being 20 years of age.
- He appeared honest and remorseful.

As can be seen, all seven state they believed the complainant to be at least 17 years of age. Section 124(2) of the *Criminal Code* states it is a defence to the charge of having unlawful sexual intercourse if the accused person believed on reasonable grounds that the other person was of or above the age of 17 years. With the exception of (Male 6), the following apply:

1. They all replied to an advertisement in the newspaper advertising the complainant as 18 years of age. Some even state they did not believe it was possible to advertise your services unless you were 18 years of age.
2. A number of them, upon asking her age, were told by the complainant that she was 18 or 19.

3. They had limited conversation with her.
4. They were generally in a darkened room.
5. They had not sought to have sex with somebody under age and were not expecting to have sexual intercourse with somebody under age.
6. The complainant's physical appearance was of a person who looked much older than 12 years of age.

Another factor to be taken into account is the sheer improbability of people advertising a 12 year old for prostitution. All of the above seven people believed the complainant to be 18 years old or older.

Given the above factors, I am of the view that a jury would be satisfied that the accused men had reasonable grounds and thus there is no reasonable prospect of conviction.

In respect of (Male 6), at the time he was only 17 years of age, the complainant got into his bed at a party, he thought she was 17 years of age and text messages confirm this belief. Given the circumstances and his age, I am of the view there is no reasonable prospect of conviction.

Even if there was a prospect of conviction, I am of the view that it is not in the public interest to proceed with the seven prosecutions. The complainant is only 13 years of age. If we proceed with the above cases, the accused would have to be tried separately. The accused men do not know each other nor did they plan such crimes together so it could not be said the crimes arose out of the same closely related facts or that they are a series of crimes (see s 311(2) of the *Criminal Code*). The Crown would be obliged to call the complainant on each trial, even though she cannot identify the accused. Identity is not likely to be in issue, however, her evidence would still be highly relevant to the issue of the accused men's belief in respect of age and the reasonableness of the belief. It is the duty of the Crown to call such relevant material witnesses (see *R v Apostilides* (1984) 154 CLR 563; *Dyers v R* (2002) 210 CLR 285). In effect this, with the addition of the (X) case, would require calling the complainant eight times.

I spoke to the complainant's father on 24 August 2010. I discussed with him the possibility of the complainant giving evidence and outlined some of the problems the prosecution faced. He stated that this would be very traumatic for her and he doubted whether she would wish to give evidence. He told me he would discuss it with her and get back to me. I telephoned him on 13 September 2010 and he stated neither he nor the complainant wish her to give evidence in these cases.

Of course, the Crown could compel the complainant to give evidence. However, even if convicted, the accused men's culpability is miniscule compared to that of (M) and Devine who knowingly prostituted a 12 year old. The judge is likely to sentence the accused men on the basis that they did not seek to have sexual intercourse with an underage person but in the circumstances their belief was not reasonable. In respect to single counts of sexual intercourse with a young person approximately 60% of sentences are non-custodial. Of the remaining sentences, it is rare for anybody to receive a sentence greater than six months' imprisonment except where there has been a severe breach of trust. Often custodial sentences are suspended (see 'Sentencing in Tasmania', Kate Warner, 2<sup>nd</sup> ed at p 314).

In the above circumstances, even if a prison sentence was given, it is unlikely to be a lengthy sentence. These matters will attract an inordinate amount of publicity. The complainant has been greatly affected. Her father stated the following in a victim impact statement tendered on the sentencing hearing of (M):

“ \_\_\_\_\_ ”

(Full terms deleted, but detailing severe trauma, ostracism, alienation, stigmatisation, difficulties in peer socialisation and misplaced guilt)

Repeated trials would undoubtedly increase the trauma the complainant has already suffered. Given the unlikelihood of convictions and even if there are convictions, the likely sentences the accused men would face, in my view, it is not in the public interest to repeatedly subject the complainant to giving evidence and the resulting trauma that she would as a result suffer.

In conclusion, I am of the view there are no reasonable prospects of conviction in respect of any of the men for which Police have sought advice, nor is it in the public interest to pursue such prosecutions. Thus, no charges should be laid by the Police.

D G Coates SC  
**ASSISTANT DIRECTOR OF PROSECUTIONS**

## Appendix 2

### ***Criminal Code: sexual crimes of specific application to children:***

- 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
- s 127 indecent assault
- s 127A aggravated sexual assault
- s 130 - 130E offences relating to child pornography

### **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 3

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

JURISDICTION	SECTION	OFFENCE	MISTAKE AS TO AGE	CONSENT
<b>TAS</b> <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: (a) C was 15 or over and D was not more than 5 years older than C (b) C was 12 or over and D was not more than 3 years older than C
<b>VIC</b> <i>Crimes Act 1958</i>	45 – sexual penetration of child under 16  48 – sexual penetration of 16 or 17 year old child	Sexual penetration of child under 16  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  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: (a) the D was not more than 2 years older than the child; or (b) the D believed on reasonable grounds that s/he was married to the child  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> <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

Appendix 3

JURISDICTION	SECTION	OFFENCE	MISTAKE AS TO AGE	CONSENT
<b>NSW</b> <i>Crimes Act 1900</i>	66A – sexual intercourse – child under 10  66C – sexual intercourse – child between 10 and 16	Any person who has sexual intercourse with a child under 10  (1) Any person who has sexual intercourse with a child between 10 and 14  (3) Any person who has sexual intercourse with a child between 14 and 16	No mistake as to age  No express mistake as to age but common law defence of honest and reasonable mistake available ( <i>CTM</i> ).	77 – consent of the child no defence to a charge under 66A or 66C
<b>SA</b> <i>Criminal Law Consolidation Act 1935</i>	49 – unlawful sexual intercourse	(1) unlawful sexual intercourse – child under 14  (3) unlawful sexual intercourse – child under 17	No mistake as to age  49(4) – defence to 49(3) to prove that: (a) the C was 16 or older; and (b) the accused – (i) was under 17; or (ii) believed on reasonable grounds that C was of or above 17	49(7) consent no defence
<b>WA</b> <i>Criminal Code</i>	320 – child under 13, sexual offences against  321 – child of or over 14 and under 16, sexual offences against	A person who sexually penetrates a child (under 13)  A person who sexually penetrates a child (aged 14 or 15)	No mistake as to age  321(9) – subject to (9a) it is a defence to prove the D (a) believed on reasonable grounds that the child was of or over the age of 16 years; and (b) was not more than 3 years older than the child  321(9a) – 321(9) doesn't apply where the child is under the care, supervision, or authority of the D	No consent  No consent

Sexual Offences Against Young People

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JURISDICTION	SECTION	OFFENCE	MISTAKE AS TO AGE	CONSENT
<b>NT</b> <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
<b>ACT</b> <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  (2) A person who engages in sexual intercourse with a young person under 16 is guilty of an offence	No mistake as to age  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  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> <i>Sexual Offences Act 2003</i>	5 – rape of child under 13  9 – sexual activity with a child  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 12.  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.  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.  13(2) sets out different punishments for offenders under 18	No mistake as to age in Act  9(1)(c)(i) A must reasonably believe that C is 16 or over.	No consent provision in Act



Appendix 3

JURISDICTION	SECTION	OFFENCE	MISTAKE AS TO AGE	CONSENT
<p><b>Canada</b> <i>Criminal Code</i></p>	<p>151 – sexual interference</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 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 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>

Sexual Offences Against Young People

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JURISDICTION	SECTION	OFFENCE	MISTAKE AS TO AGE	CONSENT
<p><b>NZ</b> <i>Crimes Act 1961</i></p>	<p>132 – sexual conduct with child under 12</p> <p>134 – sexual conduct with young person under 16</p> <p>134A – defence to charge under s 134</p>	<p>132(1) every person who has sexual connection with a child (under 12) is liable to imprisonment</p> <p>134(1) every person who has sexual connection with a young person (under 16) is liable to imprisonment.</p> <p>134A(1) it is a defence to a charge under s134 if the A proves –</p>	<p>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.</p> <p>134A(1)It is a defence if A proves: (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 (b) he or she believed on reasonable grounds that the young person was of or over 16; and (c) the young person consented.</p> <p>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.</p>	<p>132(5) it is not a defence to a charge under s132 that the C consented.</p> <p>134(4) no person can be convicted of a charge under s134 if at the time they were married to the young person</p> <p>134A(2)(a) except to the extent provided in s134A(1), it is not a defence that the young person consented.</p>