

Department of Police and Emergency Management

COMMISSIONER'S OFFICE

47 Liverpool Street, Hobart TAS  
GPO Box 308, Hobart, TAS 7001 Australia  
Ph (03) 6230 2111 Fax (03) 6230 2117  
Web www.tas.gov.au

Our Ref: A12/45047  
Your Ref:  
Enquiries:



3 July 2012

Professor Kate Warner  
Director  
Tasmania Law Reform Institute  
Faculty of Law  
Private Bag 89  
HOBART TAS 7001

Dear Professor Warner

**TASMANIA LAW REFORM INSTITUTE ISSUES PAPER No. 17 – SEXUAL OFFENCES AGAINST YOUNG PEOPLE**

Thank you for the opportunity to comment on the Tasmania Law Reform Institute Issues Paper No. 17, *Sexual Offences Against Young People*.

I have had the Issues Paper reviewed and you will find attached a response to each of the nine questions outlined in the Issues Paper.

I have also provided additional comment in relation to s124 of the *Criminal Code Act 1924*, Sexual intercourse with young person, and also s130-130E of the *Criminal Code Act 1924* and 71-74B of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*, both relating to child exploitation material.

I have also forwarded a copy of this correspondence to the Secretary, Department of Justice.

Should you wish to discuss these matters, please make contact with Inspector Wayne Moore or Senior Constable Elaina Deayton via telephone on 62 302600.

Thank you again for the opportunity to comment on the Issues Paper.

Yours sincerely

D L Hine  
SECRETARY

## Tasmania Police Service

Response to Tasmania Law Reform Institute  
Issues Paper No. 17, May 2012

### Sexual Offences Against Young People

#### 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?

Tasmania is currently the only jurisdiction in Australia that does not have a 'no defence age' provision relating to sexual crimes.

The Tasmania Police Service agree with having a 'no defence age' for the crimes of:

- Sexual intercourse with a young person;
- Aggravated sexual assault;
- Indecent assault; and
- Indecent act with a young person.

Consideration should also be given to the 'no defence age' to cover s35(3) of the *Police Offences Act 1935*, which relates to Assault with indecent intent.

Tasmania Police believe that the appropriate age should be under 12-years, which is consistent with the approach in Victoria. This provides enhanced public protection of children. It is reasonable to assume that a child under 12-years is sufficiently immature in both their actions and appearance that it should be apparent to an adult that they are not of lawful age for sexual conduct. This amendment seeks also to encourage adults to be responsible and accountable for their actions and to deter them from sexual contact with young people.

Developing this gradation within Tasmanian legislation will also reflect the seriousness of sexual offences against very young children.

#### 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)?

Tasmania Police support retaining the mistake as to age defence within the *Criminal Code* and believe that it should be retained for all offences except s125A, Maintaining Sexual Relationship with a Young Person. For a charge to be substantiated under s125A, the accused must have committed an unlawful sexual act in relation to the young person on at least 3 occasions.

Where an offender has had 3 separate sexual contact occasions with the victim, it is reasonable that the offender would be aware that the victim is not of lawful age to provide

proper consent. The relevant immaturity of the victim should be apparent through the repeated physical or verbal interactions that have occurred on three or more occasions.

#### 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) s272.16 formulation) or that mistaken belief be required to be both honest and reasonable (the current Tasmanian position)?

Tasmania Police support the retention of the 'mistake as to age' defence, however believe that this defence should be based on both an honest and reasonable mistake. Adopting this defence allows for both the subjective and objective perspective to be applied when determining the cogency of the defence.

#### 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?

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

The ability for an individual to determine the age of a young person is not only reliant on their age, but should take into account many other factors including class, culture, ethnicity and other social factors. This provision is discriminatory to older adults, who should be provided with the same legal defence as a younger accused adult.

#### 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?

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

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

Question 6

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

The *Criminal Code* recognises that consent may play a role between young people in sexual activity, and therefore offers a range of statutory formulations for consensual activity between young people under the age of consent but similar in age.

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

In a situation where the accused is 19, the complainant is 14 and the accused can argue mistaken belief that he believed the complainant was 15, this defence should be available to the accused, especially where consent is not an issue.

Tasmania Police agree that legislative amendment should occur to clarify the current situation regarding mistake as to age and consent defences to allow a defence of mistaken belief as to the age of the young person in circumstances in which if the belief were true and correct the conduct would be lawful.

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?

(a) For consistency Tasmania Police believes that the 'mistake as to age' defence should be consistent for the crimes of:

- Sexual intercourse with a young person;
- Aggravated sexual assault;
- Indecent assault;
- Indecent act with a young person; and
- Procurement and communication offences relating to a young person under the age of 17 years.

The current position of 'mistake as to age' defences for s127 and s127A (indecent assault and aggravated sexual assault) is different to s124 (sexual intercourse with a young person).

Tasmania Police believes that a specific 'mistake as to age' defence be provided for all of these offences and that the defence contained in s14 should then not be applicable to these offences.

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

#### 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?

Tasmania Police do not agree with adopting this uniform test, but rather agree with the adoption of the 'honest and reasonable' mistaken belief as to age.

#### Question 9

- (a) Should the defence of mistake as to age in s125A(5) be repealed?
- (b) Should maintaining a sexual relationship be redefined so that, provided at least one 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 the child'?

(a) Tasmania Police support repealing the mistake as to age defence for s125A, Maintaining Sexual Relationship with a Young Person. For a charge to be substantiated under s125A the accused must have committed an unlawful sexual act in relation to the young person on at least 3 occasions. Where an offender has had 3 separate sexual contact occasions with the victim, it is reasonable that the offender would be aware that the victim is not of lawful age to provide proper consent. The relevant immaturity of the victim should be apparent through the repeated physical or verbal interactions that have occurred on three or more occasions.

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

Additional Consideration

Section 124 – Sexual intercourse with a young person

Consider repealing subsection (5), which provides:

*(5) Subsection (3) is not a defence to a charge under this section in the case of anal sexual intercourse.*

Section 124(5) makes it unlawful for youths to engage in anal sexual intercourse, even if both youths are consenting and both youths are aged in compliance with the relevant age defence. This not only discriminates against homosexual youth, but also against heterosexual youth who wish to experiment with anal sexual intercourse. Subsection (5) was inserted when the section proscribing anal sexual intercourse was repealed from the Code in 1997.

Tasmania Police requests that the TLRI consider recommending the repeal of this subsection as it is discriminatory and no longer contemporary.

Additional consideration

Consider applying the age defences within s124 of the Code to s130-130E of the *Criminal Code Act 1924* and 71-74B of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*.

Section 130-130E of the Code, and s71-74B of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* involve the crimes of producing, accessing, distributing, and possessing child exploitation material (CEM), along with involving children in CEM. These crimes incorporate sexting, which is now defined in the Macquarie dictionary as:

‘the sending and receiving of sexually explicit images via mobile phones’

The current legislation may capture children who send images consensually to other children, for example a 16-year old girl texting her 17-year old boyfriend a naked photograph. This situation allows the child sending and the child receiving to both be charged under the *Criminal Code Act 1924* and also the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*. In addition it allows for placement on the Community Protection Register provided for by the *Community Protection (Offender Reporting) Act 2005*.

Tasmania Police acknowledge that some incidents of sexting will involve consensual exchange of images and text between youths. Where this behaviour is occurring consensually the involvement of police should be very limited to lessen the impact on the children involved. The mere involvement of police is likely to cause the child to feel shame, guilt and embarrassment, which may lead to detrimental social and psychological outcomes for the child. Sexual exploration is recognised as a normal part of child development, and any negative experience throughout this development may adversely impact a child’s view of their sexuality. The present generation of children are growing up in a digital culture, to the extent that these digital activities are embedded in their everyday experiences. This illustrates that young people’s relationships with each other, including how they interact and socialise, are being transformed. Taking this view, there needs to be clear distinction between young

people of a similar age exploring their sexuality and the very serious offence of child sexual exploitation – they are not the same.

For these reasons Tasmania Police requests the TLRI to consider recommending amendments to the *Criminal Code Act 1924* and the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* to provide for the age defences that are currently listed in s124 of the *Criminal Code*, these being:

**(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.*