

Sexual Offences Against Young People

Issues Paper no. 17 2012

Submissions to the Tasmanian Law Reform Institute by Hobart Community Legal Service

About Hobart Community Legal Service

Hobart Community Legal Service (HCLS) is a not for profit legal service which provides legal advice and representation to low-income people in family law, administrative, civil and minor criminal matters.

The Service does not generally represent clients in indictable matters, including the offences which are the subject of the TLRI's Issues Paper. However, the service does work to protect human rights and civil liberties across all parts of the justice system, as the victims of breaches of these rights and liberties are most often low-income people.

These values inform the contents of Hobart Community Legal Service's submission.

1. Towards a “No Defence Age”

The issues paper countenances a “No Defence Age” of with regards to sexual offences against young people. This being an age at which the defence of Honest and Reasonable mistake would not be available to defendants.

The authors have a number of concerns with this approach that will be discussed below.

Beyond mens rea

As is noted in the discussion paper at 4.2.8, the notion of the “guilty mind” is an important element of our criminal justice system.

The principal, endorsed by the High Court in a long line of authority running from *Proudman v Dayman [1941] HCA 28* through to *He Kaw Teh [1985] HCA 43*, is that the morally blameless should not be held legally responsible.

The removal of the defence of honest and reasonable mistake in sexual offences cases would essentially create an absolute liability offence.

As the court noted in *He Kaw Teh*, there are serious consequences for removing the mental element to serious offences which lead to imprisonment.

The creation of absolute liability offence of Sexual Intercourse with a Young Person may create a situation where an individual could be convicted of a sexual offence despite being able to satisfy a jury that they had no knowledge that they were committing a crime.

Beyond human rights

Due to the lack of human rights or civil liberties protections enshrined in Tasmanian law, an individual who has his or her rights infringed may not appeal to the courts on this basis.

Given this fact (and it is the belief of the authors that the lack of enshrined human rights protections is now a significant shortcoming and increasingly an anachronism of Tasmanian law) it is submitted that the legislature has an additional duty to ensure that laws do not infringe human rights.

HCLS are persuaded by human rights based arguments advanced against absolute liability for an offence which is created regardless of moral culpability or awareness.

The Vanishing Deterrent Effect

It may be claimed that the establishment of a “no defence age” will create a deterrent to individuals who may otherwise engage in sexual activity with young people.

HCLS rejects outright the suggestion that creating a no defence age creates a deterrent. HCLS agrees with the argument advanced by Ashworth that using the exemplary punishment of certain parties for some related “greater good” is both ill founded and unfair.

An Unsound Basis

Finally, HCLS argues that it is not desirable to reform the law in the current environment.

The issues paper, throughout Part 1 especially at 1.1.14, makes reference to “community outrage” in reaction to decisions made by

the Director of Public Prosecutions with regard to alleged sexual offences against children.

HCLS believes that this account drastically understates the role of media outlets in distorting facts and shaping community opinion on this matter.

The fact is that community concern over the decision of the Director of Public Prosecutions not to pursue further prosecutions with regard to the Devine case was influenced by a sustained and misleading campaign by the media, most notably the Hobart Mercury, over a number of months.

The titles of articles referred to in the issues paper illustrate the bias shown by The Mercury on this issue: "Sex with girl culprits to get off" (at footnote seven), "Tassie a paedophile paradise" (At footnote twenty two).

The tone of such articles was drenched in hyperbole, facts regarding aspects of the Devine case were omitted or misstated either in error or deliberately. In addition, "expert" opinion was drawn on almost exclusively from parties willing to go as far as or further than The Mercury's editorial line in attacking the Director of Public Prosecutions, the law or the judiciary (such as "Beyond Abuse" spokesman Steve Fisher, who was the author of the aforementioned "paedophile paradise" comment).

Such was the tone of the attacks that the DPP took the unusual step of releasing part of a memorandum concerning the case and appearing to be interviewed on the ABC's *Stateline* program to correct the record.

HCLS suggests that community outrage should be viewed in the light of this campaign of misinformation, and that a response to the calls for legal reform in this environment should be treated with caution.

HCLS contends that it is not in the interests of justice to pursue major legislative reform in response to an inflammatory campaign by media interests.

In short, lawmakers and the legal profession should avoid allowing themselves to be led around by the nose by media sensationalists. To allow this would set a dangerous precedent.

Recommendations:

Question 1(a)

It is contrary to the public interest to convict and potentially imprison individuals in circumstances where they honestly and reasonably believed that they were not committing an offence at the time of the act.

HCLS strongly opposes the establishment of a “no defence age” in relation to sexual offences against young people.

Question 4(1)

The Honest and Reasonable mistake defence should be available to all defendants. The honesty and reasonableness of the mistake should be a question of fact determined at trial, not predetermined by legislation.

The defence of Honest and Reasonable Mistake As To Age should be available regardless of the age of the defendant.

2. Reformulating the offence of “Maintaining a Sexual Relationship with a Young Person”

HCLS agrees with the view that “Maintaining a sexual relationship with a young person” does adequately reflect the nature of the act.

The phrase “maintaining a sexual relationship with a young person” is euphemistic. HCLS supports the renaming of this offence to “persistent sexual abuse of a young person.”

Question 9 (c)

The offence of Maintain a sexual relationship with a young person should be renamed “persistent sexual abuse of a child”