

Level 1,
119 Macquarie St,
Hobart TAS 7000
phone (03) 6233 4520
fax (03) 6233 4515
childcomm@childcomm.tas.gov.au
www.childcomm.tas.gov.au



Your Ref:
Our Ref: 484: IC

Professor Kate Warner
Director
Tasmania Law Reform Institute
E-mail: law.reform@utas.edu.au

17 July 2012

Dear Professor Warner

Sexual Offences Against Young People

Thank you for your letter of 8th May 2012 inviting my comments in response to the Institute's 17th Issues Paper - *Sexual Offences Against Young People*. I commend you on your well researched and comprehensive paper regarding this very complex area of law.

I am pleased to provide my comments which are set out in the attached submission and note it was agreed that my submission would be provided by today's date.

If you have any queries or questions please contact Isabelle Crompton, Policy Officer, in the first instance. Isabelle can be contacted on (03) 6233 9325 or by email to isabelle.crompton@childcomm.tas.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read "Aileen Ashford". The signature is stylized and somewhat cursive.

Aileen Ashford
Commissioner for Children

**Submission to the
Tasmania Law Reform Institute
in response to
Sexual Offences Against Young People
Issues Paper No. 17**

**AILEEN ASHFORD,
COMMISSIONER FOR CHILDREN**

17 July 2012

MY ROLE AND FOCUS

Thank you for the opportunity to respond to the matters discussed in your Issues Paper concerning the laws relating to sexual offences against young people in Tasmania ('the paper').

As you may be aware, the Commissioner for Children is an independent officer appointed by the Governor pursuant to s78 of the *Children, Young Persons and Their Families Act 1997*. The Commissioner's powers and functions are set out in Part 9 of that Act.

A major focus of my role is to promote the health, welfare, care, protection and development of children and young people and to provide advice to the Minister for Children on policy, practice and services provided to or for children and young people in Tasmania, which may include any laws affecting the wellbeing of children.

My comments are guided by the following principles expressed in the *Convention on the Rights of the Child* (CROC) which provides an appropriate framework for analysis of policy and legislative proposals which have the capacity to impact upon the rights and wellbeing of children and young people who are the victims of sexual offences:

Article 3.1 (best interests):

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 19.1 (protection from violence, including sexual abuse):

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 34 (sexual exploitation):

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse...

Implicit in CROC principles is the need to ensure that legislation and policy prioritises the protection of children from harm or the risk of harm wherever practicable and promotes their health and well-being and in all matters affecting children and young people, their **best interests** must be a primary consideration.

It should also be acknowledged in any discussion of sexual offences against young people that young people may be charged with such offences. To that end, in addition to the 'best interests' principle, the following principle expressed in CROC is of relevance:

Article 40 (juvenile justice):

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular...

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

In considering this area of law, regard must be had to the need to balance the following basis human rights:

1. The need to take appropriate measures to protect children and young people from premature sexual activity and from sexual abuse or exploitation; and
2. The right of the accused to a fair trial and to be presumed innocent until proven guilty – a right which is relevant to adults *and* to young people accused of sex offences.

BACKGROUND

The paper discusses a particularly complex area of criminal law which involves very confronting subject matter. I agree with the Institute that great care needs to be taken to respond in a careful and principled manner to the concerns raised as a consequence of the 2009 case that gave rise to the current project.

I note the empirical evidence of the harmful effects of child sexual abuse (CSA) reviewed at pages 11-13 of the paper and the justification for the presumption of harm that underlies the prohibition of adult sexual activity with children. It is widely accepted that due to their immaturity and dependency, children are unable to consent to sexual activity in the same way as adults.

When considering the law of sexual offences against young people (in this case, those aged below the age of consent), appropriate attention must be given to providing robust legislative protection for children and young people against premature sexual activity, sexual abuse or exploitation without criminalizing non-coercive consensual sexual exploration between young people of the same or similar age.

SUBMISSION

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?**

Tasmania does not presently have a 'no defence age' below which there is no defence of consent or mistake as to age available to a person charged with a sexual offence against a child or young person. All other Australian state and territories do.

Notwithstanding the various arguments against such an approach canvassed in the paper, on balance I am of the opinion that a "no defence age" is justifiable on policy grounds.

Children and young people are particularly vulnerable members of our community and as a society, we have an obligation to protect them from all forms of sexual abuse or exploitation. It has been said that

[b]y outlining proscribed conduct, the law can serve a vital educative and symbolic function in its condemnation of unacceptable behaviour. In this way, the criminal law can set a powerful benchmark for community standards.¹

The introduction of a 'no defence age' which effectively provides absolute liability to those who engage in sexual activity with young people below a set age will provide a clear expression of the degree to which sexual offending against young people is condemned by our community and the extreme level of care that must be taken by a person considering whether to engage in sexual activity with a young person.

(b) If so what should the no defence age be?

It is very clear that opinions differ significantly about what the 'no defence age' should be².

I am conscious that 'no defence age' provisions presently range between 10 and 16 across the Australian state and territory jurisdictions. Internationally, the 'no defence age' also varies (eg in New Zealand it is 12 and in the United Kingdom it is 13).

Clearly there is no agreement as to where the cut-off point or 'no defence age' should be. To exacerbate this difficulty, international research on changes in maturation rates over time show that 'changes in the timing of puberty, the nature of social-role changes, and the hopes and aspirations of adolescents across the world are widely affected by economic and sociocultural factors'.³

Due to these vagaries, at this point I do not have a strong view about what the no defence age should be.

In the event a no defence age is to be introduced, it may be that the Institute's present consultation process will bring to light information and evidence which may assist in determining an appropriate age. Further, it may be that reasons provided by advocates *against* a no defence age in response to Question 1(a) will be relevant to the age selected and may therefore inform any ongoing discussion.

Finally, I am conscious that in setting a no defence age, regard must be had to the fact that it would potentially apply to young people who engage in non-coercive, consensual sexual activity with other young people of a similar age. In saying this, I do not intend to condone unlawful sexual activity. However, I do highlight the fact that sexual offences against young people can cover a very wide variety of factual scenarios and that young people engage in a range of sexual activities at increasingly earlier ages. For example, a student survey conducted in 2008 by the Australian Research Centre in Sex, Health & Society shows that over one quarter of those in year 10 and more than half of year 12

¹ Model Criminal Code Officers of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5 – Sexual offences Against the Person - Report* (1999), 5.

² See for example the discussion in Model Criminal Code Officers of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5 – Sexual offences Against the Person - Report* (1999).

³ S. Sawyer, R. Afifi, L. Bearinger, S. Blakemore, B. Dick & G. Patton, Adolescence: a foundation for future health, *The Lancet*, 379, 2012, 1631. See also, S. Sawyer & G. Patton, Why Adolescent Health Matters, *Health*, 2011.

students reported ever having sexual intercourse and this was a considerable increase over the previous survey conducted in 2002.⁴

I would certainly welcome the opportunity to be involved in any further discussion regarding the appropriate age at which to set a no defence age.

Question 2

a) Should the defence of mistake as to age be retained?

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

b) If yes, should it be retained in relation to all offences, or to some only (and if so, which)?

No comment.

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)?

In the event the defence is retained, I prefer a test which involves an objective as well as a subjective test as is presently the case in Tasmania; please also see my response to Question 5 in which I recommend additional limitations on the defence of mistake as to age be considered.

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?

Excluding the defence for older accused persons might be supported on the basis that age disparity could be an indicator of exploitation. If the other elements of the offence are robust I see no need to include an additional complication such as this.

b) If yes, what should that age be?

No comment.

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?

It appears appropriate that an accused person should not be permitted to rely on the defence of mistake as to age unless he or she has taken positive steps to ascertain the age of the young person in question.

⁴ Smith A, Agius P, Mitchell A, Barrett C, Pitts M. 2009. Secondary Students and Sexual Health 2008, Monograph Series No. 70, Melbourne: Australian Research Centre in Sex, Health & Society, La Trobe University.

New Zealand law requires (in addition to a reasonable belief that the young person was over the age of consent) that the defendant take reasonable steps to find out whether the young person was of or over the age of consent. It appears that this approach is similar to other aspects of our law. For example, in proceedings for an offence against section 124, 125B, 127, 127A or 185 of the *Criminal Code Act 1924* (the *Code*), a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused –

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

It would appear that a similar limitation on the defence of mistake as to age might be appropriately introduced.

Question 6

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

No comment.

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?**

I agree with the Institute's view that the inconsistency of the onus of proof in relation to different sexual offences against young people is unjustifiable on rational grounds.

The Institute has aptly illustrated the complexity and confusion which can arise as a consequence of the current legal situation by reference to the case of *Martin* where the trial judge was obliged to provide different directions to the jury in relation to the each of the charges on the indictment.

I agree in principle with the Institute's position that uniformity is needed and that the onus of proof should be consistent in relation to the above mentioned sexual offences against young people.

- 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 (*sic*) 17 or should there be a legal burden on the defendant to prove such a mistake?**

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

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

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?

No comment

Question 9

a) Should the defence of mistake as to age in s 125A(5) be repealed?

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

The Institute has indicated that this problem could be addressed through repeal of the defence of mistaken belief as to age in relation to this crime. It would appear that defences specific to the individual unlawful sexual acts relied on to prove the substantive crime would continue to operate.

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?

For a charge of 'maintaining a sexual relationship with a young person' (ie three or more unlawful sexual acts perpetrated against a child or young person), it appears that unlawful acts perpetrated against a young person outside Tasmania cannot presently be taken into account by the Court. This was the approach adopted by Blow J in the 2005 case of *Tasmania v S*⁵ which involved very serious sexual abuse of two children by their father. The daughter gave evidence of a number of sexual acts which - but for the fact they took place outside the State - would have formed part of the criminal conduct for which the accused was ultimately sentenced.

According to the Australian Law Reform Commission, the impetus for the introduction of s125A type crimes was

recognition of the practical difficulties encountered in successfully prosecuting child sexual offences. The requirement of particularity in child sexual offences—that is, precise details of single incidents—fails to capture the multiple, repetitive experiences of many children, particularly in the context of sexual abuse by family members...⁶

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

The express position in New South Wales in relation to the equivalent charge of persistent sexual abuse of a child is that it is immaterial that conduct constituting a

⁵ *Tasmania v S*, COPS, Blow J, 30 November 2005.

⁶ Australian Law Commission (2010). *Family Violence—A National Legal Response*, 25.52.

sexual offence occurred outside New South Wales, provided the conduct on at least one occasion occurred in New South Wales.⁷ I note that this position is consistent with provisions of the proposed Model Criminal Code⁸.

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

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

c) Do you agree that the offence be renamed 'persistent sexual abuse of a child'?

The Victorian Law Reform Commission has previously said that it is inappropriate to label child sexual abuse as a sexual 'relationship'. It successfully recommended amendment of the Victorian equivalent of s 125A to 'persistent sexual abuse of a child'⁹. New South Wales and Western Australia also use this terminology.¹⁰

The use of the word 'relationship' connotes an emotional and sexual association or partnership between two people¹¹ and fails in my view to convey the abusive and exploitative nature of such conduct.

I am therefore of the view that the offence of 'maintaining a sexual relationship with a young person' pursuant to s 125A should be renamed 'persistent sexual abuse of a child'.

OTHER MATTERS

Uniformity

It is clear that uniformity in the law relating to sexual offences against young people across the states and territories is preferable. In its report in relation to sexual offences the Model Criminal Code Officers of the Standing Committee of Attorneys-General said

An area of criminal law as important as sexual offences should apply uniformly throughout the country, in fairness to both victims and those charged with offences. Uniformity of protection should allow for the easier provision of advice to victims and defendants, wherever they may reside. Uniformity would ensure that the same laws, evidentiary rules and penalties apply.

⁷ *Crimes Act 1900* (NSW) s 66EA(3).

⁸ Standing Committee of Attorneys-General, *Model Criminal Code* (1st ed, 2009) cl 5.2.14.

⁹ See s 47A of the *Crimes Act 1958* (Vic).

¹⁰ See *Crimes Act 1900* (NSW) s 66EA; *Criminal Code* (WA) s 321A. See also Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) cl 5.2.14.

¹¹ "relationship, n.". OED Online. June 2012. Oxford University Press.
<http://www.oed.com.ezproxy.education.tas.gov.au/view/Entry/161816?redirectedFrom=relationship> (accessed June 27, 2012).

Uniform laws would also reinforce the national approach taken with respect to the protection of children. The *Family Law Act 1975*, for instance, seeks to address the needs of children across interstate boundaries. An integrated response to child sexual abuse and effective co-ordination between Federal and State agencies would be assisted by uniform criminal legislation.

Uniformity would also enhance research and data collection with regard to sexual offences throughout Australia. It is very important to develop comprehensive research about sexual offences in order to permit informed policy and law reform. Governments and non-government agencies need to have detailed knowledge of sexual offences in order to respond effectively and provide appropriate services. The different definitions and categories of sexual offences create difficulties in developing meaningful comparative research across Australia.¹²

Any consideration of possible amendments to the Tasmanian law concerning sexual offences against young people must therefore not occur in isolation but take into consideration developments and ongoing discussions about the law relating to sexual offences against young people and other related developments in other states.

Prosecutorial Discretion

It is my impression that it is not commonly understood that in Tasmania there is a presumption against criminal responsibility for young people below the age of 14¹³, and children aged less than 10 years cannot be held criminally responsible for their actions.¹⁴

Children and young people are therefore not excluded from our laws relating to sexual offences against young people except to the extent that the similar-age consent provisions might apply. In my opinion, safeguards should be in place to ensure that decisions to charge or prosecute young people for these types of offences are made with regard to the particular circumstances of the case and are consistent with the public interest.

I note the Prosecution Guidelines published by the Director of Public Prosecutions recognise that

[s]pecial considerations apply to the prosecution of persons under the age of 16 years. Prosecution action against children should be used sparingly and in making a decision whether to prosecute particular consideration should be given to available alternatives to prosecution, such as a caution or reprimand, as well as to the sentencing alternatives available to the relevant Youth Justice Court if the matter were to be prosecuted.¹⁵

To the extent that legislative amendments may be made that have the effect of expanding the circumstances in which non-coercive, consensual sexual exploration between young people of the same or similar age is potentially conduct that is unlawful, consideration could also be given to including specific criteria to be considered when determining if a youth should be prosecuted for a sexual offence against a young person.

¹² Model Criminal Code Officers of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5 – Sexual offences Against the Person – Report* (1999), 2-3.

¹³ The Code, s18(2).

¹⁴ The Code, s18(1).

¹⁵ http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines

CONCLUSION

I congratulate the Institute for preparing such a comprehensive Issues Paper in relation to such a complex area of law. I hope the above observations and recommendations are of assistance.

Aileen Ashford
Commissioner for Children