

# SETTING THE BOUNDARIES OF CHILD SEXUAL ASSAULT: CONSENT AND MISTAKE AS TO AGE DEFENCES

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*[Many changes have been made to the substantive criminal law relating to child sexual assault in recent decades in response to the recognition of the problems and risks associated with child sexual abuse. Considerable differences between jurisdictions have emerged in offence structures and in relation to the defences of consent and mistake as to age. This article argues that attempts to better protect children and young people from sexual abuse and exploitation have resulted in the over-criminalisation of sexual behaviour between young people and the creation of absolute liability offences that have the potential for grave injustice. A model for the defences of consent and mistake as to age is suggested which sets appropriate boundaries for the criminal law without diminishing the law's protection of children from sexual abuse by adults.]*

## CONTENTS

I	Introduction.....	1010
II	The Current Law .....	1011
	A Sexual Intercourse with a Young Person: The Tasmanian Position ...	1011
	B The Position in Other Jurisdictions.....	1012
	1 The 'No-Defence Age' .....	1012
	2 The Age of Consent .....	1014
	3 Consent Defences .....	1015
	4 Mistake as to Age.....	1016
III	Evaluating the Defences of Consent and Mistake as to Age .....	1016
	A Are Similar-Age Consent Defences Appropriate? .....	1017

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B	Restricting the Mistake as to Age Defence by a ‘No-Defence Age’ ....	1021
1	A No-Defence Age Is Contrary to the Fundamental Presumption of Mens Rea .....	1022
2	Is a No-Defence Age an Infringement of Human Rights?.....	1026
3	Is a No-Defence Age a Deterrent?.....	1028
4	Making Prosecution Easier .....	1029
5	The ‘Thin Ice Principle’ .....	1030
6	Absolute Liability Is Justified by the Seriousness of the Harm.....	1031
C	Other Restrictions on the Mistake as to Age Defence .....	1032
1	Age Restrictions on Perpetrators.....	1033
2	Adding a Requirement to Take Reasonable Steps.....	1034
IV	Conclusion .....	1035

## I INTRODUCTION

The issue of the appropriate ambit of defences to crimes of child sexual assault is one that has continued to divide both judges and policy makers across the common law world. Determining when consent or mistake as to age should be a defence gives rise to interesting and important questions of policy and principle as to the scope of the criminal law, including the issue of the appropriateness of imposing criminal liability for an imprisonable offence in cases where there is no mens rea in relation to a material element of the offence.

This article will provide an overview of Australian laws dealing with the defences of consent and mistake as to age of sexual offences involving young people (children and adolescents). Australian criminal laws are notorious for their lack of uniformity and child sexual assault laws and their defences are no exception. An attempt will be made to evaluate the scope of defences of mistake as to age and consent, and to suggest a model that achieves the aim of protecting young and vulnerable children and adolescents from premature sexual activity, sexual exploitation and abuse without over-criminalising sexual behaviour. For two reasons, the starting point in this article is the Tasmanian law. First, because the mistake as to age and the consent defences make it the most liberal and permissive in Australia. And secondly, because the relevant laws are currently under review in Tasmania.<sup>1</sup> For simplicity’s

<sup>1</sup> Tasmania Law Reform Institute, *Sexual Offences against Young People*, Final Report No 18 (2012). The impetus for the report was a case in which a 12-year-old girl was prostituted by her mother and all but one of her clients escaped prosecution on the grounds that there was

sake, the focus will be on sexual penetration or sexual intercourse with a young person as this offence is one of the most serious of the child-specific sex offences and generally exemplifies the scope of the consent and mistake defences in each jurisdiction.<sup>2</sup> For comparative purposes, reference will also be made to the legal positions in the United Kingdom, New Zealand and Canada.

## II THE CURRENT LAW

### *A Sexual Intercourse with a Young Person: The Tasmanian Position*

In Tasmania, sexual intercourse with a young person under the age of 17 years is a crime.<sup>3</sup> All the prosecution must prove is that there was an act of sexual intercourse with a person who was under the age of 17. As a general rule, the consent of the young person is no defence. However, a mistake as to age is expressly made a defence. So if the defendant can prove a reasonable belief that the young person was over the age of 17, no crime has been committed.<sup>4</sup> While 17 is the age of consent, there are defences in cases where the defendant and their sexual partner were of similar age. If the young person is 15 or 16, consent of the young person is a defence if the defendant was not more than five years older.<sup>5</sup> If the young person was 12, 13 or 14, the permissible age difference is three years.<sup>6</sup> The consent defence is not available for anal sexual intercourse.<sup>7</sup>

no reasonable prospect of conviction, primarily because of the defence of honest and reasonable belief that she was over the age of consent.

<sup>2</sup> A number of offences also proscribe non-penetrative sexual conduct irrespective of consent, typically with the same defences that apply to sexual penetration of a child or young person (for example, indecent assault contrary to the *Criminal Code Act 1924* (Tas) s 127 ('*Criminal Code* (Tas)')).

<sup>3</sup> *Criminal Code* (Tas) s 124(1).

<sup>4</sup> *Ibid* s 124(2).

<sup>5</sup> *Ibid* s 124(3)(a).

<sup>6</sup> *Ibid* s 124(3)(b). As identified by the Tasmania Law Reform Institute, it is unclear whether it is possible for an accused to combine the general defence of mistake in s 14 of the *Criminal Code* (Tas) with the consent defences in s 124(3). For example, it is not clear if an accused aged 18 who has sexual intercourse with a girl of 14 can argue that he honestly and reasonably believed the girl was 16, an age which, if true, would have made his conduct lawful by virtue of the consent defence in s 124(3)(a). See Tasmania Law Reform Institute, *Sexual Offences against Young People (Final Report)*, above n 1, 18 [2.2.3].

<sup>7</sup> *Criminal Code* (Tas) s 124(5), inserted by *Criminal Code Amendment Act 1997* (Tas) s 6.

## B *The Position in Other Jurisdictions*

Each state and territory has its own hierarchy of child sexual offences. However, all states have offences that proscribe sexual intercourse with a young person, although they differ with respect to the definition of sexual intercourse; the age of consent; the scope of the defence of consent; and the scope of the defence of mistake as to age. This section will focus on four aspects of these laws: the ‘no-defence age’, the age of consent, similar-age consent defences and the mistake as to age defence.

### 1 *The ‘No-Defence Age’*

In all Australian jurisdictions except Tasmania there is a ‘no-defence age’, in other words an age below which neither the consent of the young person nor mistake as to the age of the young person is a defence.<sup>8</sup> This is 10 years old in New South Wales and the Australian Capital Territory; 12 in Queensland and Victoria; 13 in Western Australia, 14 in the Northern Territory and 16 in South Australia. States achieve this in different ways:

- 1 NSW, the ACT, Western Australia and South Australia create separate offences for ages under which neither consent nor mistake of age is a defence:
  - a) NSW<sup>9</sup> and the ACT<sup>10</sup> have separate offences for sexual intercourse with a child under the age of 10;
  - b) Western Australia has a separate offence relating to sexual penetration of a child under the age of 13;<sup>11</sup> and

<sup>8</sup> The Commonwealth offence of sexual intercourse with a young person overseas contrary to *Criminal Code Act 1995* (Cth) sch s 272.8 (*‘Criminal Code (Cth)’*) does not have a ‘no-defence age’. An honest mistake that the child was at least 16 is a defence irrespective of the age of the child: at s 272.16(1).

<sup>9</sup> *Crimes Act 1900* (NSW) s 66A. Section 77 provides that consent is not a defence; there is no provision for mistake as to age so presumably the common law defence is not applicable. But this is not entirely clear: see *CTM v The Queen* (2008) 236 CLR 440, 505–6 [230] (Heydon J).

<sup>10</sup> *Crimes Act 1900* (ACT) s 55(1). Mistake as to age is expressly made a defence to the crime of sexual intercourse with a young person under 16, as is consent if the defendant was not more than two years older: at s 55(3). By implication, neither consent nor mistake are a defence to the crime in s 55(1).

<sup>11</sup> *Criminal Code Act Compilation Act 1913* (WA) sch s 320(1)–(2) (*‘Criminal Code (WA)’*); cf at s 321 which provides a limited mistake as to age defence for sexual offences against a child of or over the age of 13 and under the age of 16.

- c) South Australia has a separate offence of sexual intercourse with any person under the age of 14.<sup>12</sup>
- 2 Victoria, Queensland and the Northern Territory make the defence of consent conditional on proof of age above the no-defence age:
  - a) Victoria and Queensland have a single offence of sexual intercourse with a young person under the age of 16. The defences of consent or mistake as to age (or marriage) in Victoria and mistake as to age in Queensland are conditional on the fact that the young person is 12 or older.<sup>13</sup>
  - b) In the Northern Territory, the defence of mistake as to age to the crime of sexual intercourse (or gross indecency) with a child under 16 is conditional on proof that the child was of or above the age of 14.<sup>14</sup>

The Model Criminal Code Officers Committee recommended a no-defence age but left the setting of the age to each jurisdiction in its implementation of the Code.<sup>15</sup> In the Discussion Paper it had recommended a no-defence age of 10.<sup>16</sup> New Zealand and the United Kingdom also have a no-defence age. In New Zealand this is 12<sup>17</sup> and in the United Kingdom it is 13.<sup>18</sup> Like Tasmania, Canada and Ireland do not have a no-defence age that limits the defence of mistake. In Canada, mistake as to age is a defence to a charge of sexual interference with a person under the age of 16 without any restriction on the age of the complainant.<sup>19</sup> In Ireland, ‘defilement’ of a child under 15 and of a child under 17 both have the defence of honest mistake as to age without a restriction on the age of the child.<sup>20</sup>

<sup>12</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(1).

<sup>13</sup> *Crimes Act 1958* (Vic) ss 45(1), (4); *Criminal Code Act 1899* (Qld) sch 1 s 215 (*‘Criminal Code (Qld)’*).

<sup>14</sup> *Criminal Code Act 1983* (NT) s 127(1), (4) (*‘Criminal Code (NT)’*).

<sup>15</sup> Model Criminal Code Officers Committee, ‘Model Criminal Code — Chapter 5: Sexual Offences against the Person’ (Report, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, May 1999) 151.

<sup>16</sup> See *ibid.*

<sup>17</sup> *Crimes Act 1961* (NZ) expressly provides that neither mistake as to age nor consent is a defence to a charge of sexual conduct with a child under 12: at ss 132(4)–(5).

<sup>18</sup> See *Sexual Offences Act 2003* (UK) c 42, s 5; *Criminal Law (Consolidation) (Scotland) Act 1995* (UK) c 39, s 5(1), which provide an offence of sexual intercourse with a girl under the age of 13 with no defences.

<sup>19</sup> *Criminal Code*, RSC 1985, c C-46, s 150.1(4) (*‘Criminal Code (Canada)’*).

<sup>20</sup> *Criminal Law (Sexual Offences) Act 2006* (Ireland) ss 2(1), (3), 3(1), (5).

## 2 The Age of Consent

Despite repeated calls for uniformity, there is no consistency in relation to the age of consent in Australia. In South Australia (as in Tasmania) the age of consent is 17, and it is 16 in the other Australian states and territories, at least in relation to child sexual assault offences.<sup>21</sup> But this is complicated by the similar-age consent defences considered below. In the *Criminal Code* (Cth), the age of consent is 16 for the purposes of the crime of engaging in sexual intercourse with a child outside Australia.<sup>22</sup> For child pornography offences it is 18 in all Australian jurisdictions except Western Australia.<sup>23</sup> This is explained by the need to comply with the International Labour Organization's *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*,<sup>24</sup> which requires signatories to prohibit the use, procuring or offering of a child under 18 for production of pornography. In the United Kingdom, Canada and New Zealand, the age of consent is 16 for child sexual assault offences.<sup>25</sup> In Ireland it is 17.<sup>26</sup>

The Model Criminal Code does not specify the age of consent, but the Officers Committee recommended a uniform age between jurisdictions and uniformity within each jurisdiction for females and males, and for same-sex contact.<sup>27</sup> Most recently, the Australian Law Reform Commission and the New South Wales Law Reform Commission recommended that the age of consent be set at 16 with no distinction based on gender, sexuality or any other factor.<sup>28</sup> A review of the general age of consent is beyond the scope of this article. Reassessing the age of consent is a complex and controversial issue

<sup>21</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(3); *Criminal Code* (Tas) s 124(1); *Criminal Code* (WA) s 321(1); *Crimes Act 1958* (Vic) s 45(1); *Crimes Act 1900* (NSW) s 66C; *Criminal Code* (Qld) s 215; *Criminal Code* (NT) s 127; *Crimes Act 1900* (NT) s 55(2).

<sup>22</sup> Section 272.8.

<sup>23</sup> *Criminal Code* (WA) s 217A.

<sup>24</sup> Opened for signature 17 June 1999, 2133 UNTS 161 (entered into force 19 November 2000) arts 1–2, 3(b).

<sup>25</sup> *Sexual Offences Act 2003* (UK) c 42, s 9(1); *Criminal Code* (Canada) s 150.1; *Crimes Act 1961* (NZ) s 134.

<sup>26</sup> *Criminal Law (Sexual Offences) Act 2006* (Ireland) s 3. It is 16 in Northern Ireland: *Sexual Offences (Northern Ireland) Order 2008* (NI) SI 2008/1769, s 16.

<sup>27</sup> Model Criminal Code Officers Committee, above n 15, 123.

<sup>28</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 1141 [25.49]. See also Commonwealth, Royal Commission on Human Relationships, *Final Report* (1977) vol 5, 210 recommending that the general age of consent be 15 years of age; Model Criminal Code Officers Committee, above n 15, 123.

which needs to be informed by the physical development and psychological competence of children to make decisions concerning sexual behaviour as well as the impact of age of consent laws on inhibiting access to contraception, abortion and health care.<sup>29</sup>

### 3 Consent Defences

To focus only on the general age of consent in describing child sexual offences is misleading because in some jurisdictions the age of consent is variable in the sense that it depends on the availability of similar-age consent defences. As described above, the age of consent in Tasmania depends upon the age of the participants in the sexual act. A young person who is aged from 12 to 14 can lawfully consent to sexual intercourse with a person who is not more than three years older. And a young person aged 15 or 16 can lawfully consent to sexual intercourse with a person who is not more than five years older. In South Australia, the defence of consent is only available to a person who is under the age of 17 and only when the person with whom they had sexual intercourse (the complainant) was at least 16.<sup>30</sup> In Victoria, as long as the complainant is at least 12 years old and the accused is not more than two years older, consent is a defence.<sup>31</sup> The ACT has a similar-age consent defence if the complainant is 10 years of age or older and the accused is not more than two years older.<sup>32</sup> NSW, Queensland, Western Australia and the Northern Territory do not have a similar-age consent defence. The Model Criminal Code contains a 'similarity of age' defence which specifies an age difference of two years, following Victoria and the ACT.<sup>33</sup>

The Canadian *Criminal Code* provision closely parallels the Tasmanian position in relation to similar-age consent defences: consent is available as a defence if the complainant is between the age of 12 and 14 and the accused is not more than two years older or if the complainant is 14 or 15 and the accused is no more than five years older.<sup>34</sup>

<sup>29</sup> For a discussion of matters that should inform a review of the age of consent, see Matthew Waites, 'The Age of Consent and Sexual Consent' in Mark Cowling and Paul Reynolds (eds), *Making Sense of Sexual Consent* (Ashgate, 2004) 73, 73–92.

<sup>30</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(4).

<sup>31</sup> *Crimes Act 1958* (Vic) s 45(4).

<sup>32</sup> *Crimes Act 1900* (ACT) s 55(3).

<sup>33</sup> Model Criminal Code Officers Committee, above n 15, 148.

<sup>34</sup> *Criminal Code* (Canada) ss 150.1(2)–(2.1).

#### 4 *Mistake as to Age*

As explained above, in Tasmania, the defence of mistake as to age to a charge of sexual intercourse with a young person is a defence if the accused can prove on the balance of probabilities that he or she believed on reasonable grounds that the young person was at least 17 years of age.<sup>35</sup> Other than placing the onus of proof on the accused, there are no other restrictions on this defence. In all other Australian jurisdictions, the defence of mistake is restricted by the no-defence age. When the mistake defence is available, the onus of proof is on the accused in all jurisdictions except NSW.<sup>36</sup> Western Australia also limits the defence by restricting it to accused persons who are not more than three years older than the child.<sup>37</sup> South Australia's mistake defence is even more restrictive — it is only available if the young person or child is at least 16.<sup>38</sup> This means that, in effect, the no-defence age in South Australia is 16.

In the United Kingdom, the onus is on the Crown to prove that the accused did not reasonably believe the child or young person to be 16 or over.<sup>39</sup> In Scotland, it seems the onus is on the accused to prove they had reasonable cause to believe the other person was 16,<sup>40</sup> and in Ireland, the onus is on the accused to prove an honest belief that the child was 15 or 17, depending on the charge.<sup>41</sup> New Zealand and Canada have innovative restrictions on the defence of mistake, which will be discussed below.

### III EVALUATING THE DEFENCES OF CONSENT AND MISTAKE AS TO AGE

The above discussion demonstrates that there are quite striking differences between child sex offence laws in respect of both consent defences and the defence of mistake as to age.

<sup>35</sup> *Criminal Code* (Tas) s 124(2).

<sup>36</sup> The defence is not expressly mentioned in *Crimes Act 1900* (NSW) s 66C but because it applies by virtue of the common law (at least to s 66C(3)), the onus is on the Crown: *CTM v The Queen* (2008) 236 CLR 440, 456 [35] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 473 [105] (Kirby J), 495 [189] (Hayne J).

<sup>37</sup> *Criminal Code* (WA) s 321(9).

<sup>38</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(4).

<sup>39</sup> *Sexual Offences Act 2003* (UK) c 42, s 9(1)(c)(i).

<sup>40</sup> *Sexual Offences (Scotland) Act 2009* (Scot) asp 9, s 39(1).

<sup>41</sup> *Criminal Law (Sexual Offences) Act 2006* (Ireland) ss 2(3), 3(5).



### A Are Similar-Age Consent Defences Appropriate?

As the brief overview of the offence of sexual penetration of a young person demonstrates, Tasmania and Canada have quite liberal similar-age consent defences so that a young person who has sexual intercourse with another young person of a similar age is not caught by the offence. In Tasmania, for example, a 14-year-old cannot be prosecuted for having sex with a person who is 12, 13 or 14. And if that person is 15, their sexual partner cannot be prosecuted for sexual intercourse with a young person unless they are at least 20. Victoria, the ACT and South Australia also make some, but more limited, provision for similar-age consent defences.

It is clear that many young people under the age of 16 are sexually active. A national study of Australian secondary school students in 2008 found that more than 50 per cent of Year 10 students had engaged in sexual touching, 33 per cent had engaged in oral sex and more than 25 per cent had engaged in sexual intercourse.<sup>42</sup> Whilst such sexual behaviour between children and adolescents may be regarded as premature and something to be discouraged, whether it is appropriate to label it as criminal is questionable. Arguably it does not warrant the intervention of the criminal law. This is not to deny the dangers and risks in premature sex, nor to condone it. Rather than prohibition, information and advice about sex education, relationships and health should be the focus. It is important to ensure that young people have enough information to enable them to make rational and well-judged decisions about whether they are ready and able to agree to sex and to enter into sexual relationships without elements of coercing another or being coerced. Moreover, criminalising teenage sexual behaviour can have negative consequences such as inhibiting access to and provision of contraception and health care for young people. And if criminal convictions result, there is the stigma of a conviction for a sex offence and, in some jurisdictions, automatic inclusion on a sex offender register.<sup>43</sup> Given that the statutory restrictions on underage sex extend beyond penetration and cover less intrusive acts such as sexual fondling and petting, the criminalisation of adolescent sexual behaviour is

<sup>42</sup> Anthony 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' (Monograph Series No 70, Australian Research Centre in Sex, Health & Society, La Trobe University, July 2009) 26.

<sup>43</sup> A number of Australian jurisdictions (NSW, Western Australia, Queensland and the ACT) have mandatory registration for juvenile offenders: see Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Final Report No 101 (2012) 20. Mandatory registration can be an injustice for young adult offenders: at 31.

even more inappropriate. Providing similar-age consent defences recognises the reality that consensual sexual behaviour does take place between young people and ensures that the offences are used for their main purpose, namely to target adults who have sex with children.<sup>44</sup>

Counter-arguments rely upon the declaratory and educative role of the criminal law and assert that similar-age consent defences send the wrong message to young people about when becoming sexually active is acceptable. It can also be argued that sexual relationships and encounters can be abusive between similarly aged young people and similar-age consent defences remove the ability to prosecute in cases where there is exploitation. Where the conduct is genuinely consensual, prosecutorial discretion can be exercised to decline to prosecute. The objection to this is that prosecutorial discretion is not an acceptable response to the overreach of a criminal law which has the capacity to attach the label 'sex offender' to a considerable proportion of young people. Reliance upon prosecutorial or judicial discretion to mitigate the harshness of an inappropriate law is, as Spencer argues, contrary to the rule of law.<sup>45</sup> Moreover, reforms to the definition of consent mean that where a young person passively submits to undue pressure to have sex, the appropriate charge is one of rape, not sexual intercourse with a young person. In cases of a grudging and reluctant submission, the prosecution can rely upon the lack of a communicated consent to help prove the absence of consent.<sup>46</sup> The practical consequence may be that the prosecution is denied the easier task of proving the crime of sexual intercourse with a young person and the complainant is forced into the witness box to prove absence of consent. However, if there is a conviction for sexual intercourse with a young person in a case where there is coercion, the question as to the appropriate punishment arises. The conduct must be presumed to be consensual<sup>47</sup> and to punish a young person for doing something that is commonplace among so many of their peers seems unjust. Arguably too, criminalising the consensual sexual behaviour of adolescents could be seen to be an infringement of their privacy and autonomy. Even if one does not accept the sexual autonomy argument in

<sup>44</sup> Model Criminal Code Officers Committee, above n 15, 151.

<sup>45</sup> J R Spencer, 'The *Sexual Offences Act 2003*: (2) Child and Family Offences' [2004] *Criminal Law Review* 347, 354.

<sup>46</sup> See, eg, *Criminal Code (Tas)* s 2A(2)(a). For the position in Victoria, see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook, 3<sup>rd</sup> ed, 2010) 639–40.

<sup>47</sup> The rule in *R v De Simoni* (1981) 147 CLR 383 requires the sentencing judge to assume free agreement.

relation to children, criminalisation remains an inappropriate way to attempt to control consensual sexual behaviour between young people.

For those jurisdictions that do not have similar-age consent defences for child sexual offences, introducing such a defence is likely to prove controversial. It can be portrayed as an encouragement of sexual activity among young people and as weakening the protection the law offers to children from abuse and exploitation.<sup>48</sup> The argument that fundamental issues of the scope of the criminal law should be reflected in the substantive law and should not be left to be remedied by prosecutorial discretion or the sentencing process is not one that is likely to have popular appeal.

In summary, there are strong reasons in principle to narrow the scope of child sexual assault offences by providing a similar-age consent defence. The Tasmanian position, which, like the Canadian law, provides for a bigger age difference for older children than younger children, is appropriate. It ensures that young people, in limited circumstances, are free to engage in sexual activity without the risk of criminal prosecution and the adverse consequences of incurring a criminal conviction. It does not diminish the protection provided by the law to vulnerable children and adolescents from predatory sexual exploitation and abuse. Their protection from premature sexual activity remains in cases where, because of the age difference, it is appropriate that the perpetrator's behaviour be singled out from that of the victim by a prosecution. Despite prosecutorial discretion, in jurisdictions without age similarity defences there are examples in the case law of what appear to be inappropriate prosecutions.<sup>49</sup>

For instance, the Western Australian Law Reform Commission in its Discussion Paper on the *Community Protection (Offender Reporting) Act 2004* (WA), cites the following case example:

The offender pleaded guilty to four offences of indecent dealing of a child under the age of 13 years. All the offences occurred during one incident that took place at school. The offender was 15 years and 9 months of age and the complainant was 12 years and 9 months (so there was a three year age disparity).

<sup>48</sup> The response to the Model Criminal Code Officers Committee's recommendation for a 'similarity in age' defence was mainly negative: Model Criminal Code Officers Committee, above n 15, 151. See also David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5<sup>th</sup> ed, 2011) 738 for the response to suggestions to include a similar-age defence of consent in New South Wales.

<sup>49</sup> See Law Reform Commission of Western Australia, *Community Protection Act (Final Report)*, above n 43, 31; Law Reform Commission of Western Australia, *Community Protection (Offender Reporting) Act 2004*, Discussion Paper No 101 (2011) 85–6.

The offender asked the complainant to go into the girls toilets to 'hook up for a pash'. They entered the toilets and started kissing. The offender touched the complainant's breast and the complainant masturbated the offender at his request. It was accepted by the state that the complainant was a willing participant (the complainant having indicated that she willingly participated in order to make another person jealous).

The offender had no prior convictions. He was sentenced to a Youth Community Based Order for four months with a condition to attend psychological counselling. As a result of this conviction the offender would be subject to the *CPOR Act* for a period of seven-and-a-half years; he will be approximately 24 years of age before his reporting obligations cease. Because the offences involved a child under the age of 13 years the Commissioner of Police has no discretion to suspend his reporting obligations. It was reported in the newspaper that the parents of the complainant considered that it was 'ridiculous' for the offender to be placed on the sex offender register.<sup>50</sup>

While there will always be hard cases in which a prosecution appears to be unjust, a relatively liberal similar-age consent defence regime ensures that such cases are kept to a minimum. Questions remain as to setting the age limits. To some extent all age limits are arbitrary, including the age below which no defence of consent is available. This is 10 in the ACT but 12 in Tasmania, Victoria and Canada. The age in Victoria was recently increased from 10 to 12.<sup>51</sup> The primary reason for this was that it had the effect of making offences involving 10- and 11-year-old children more serious by including offences in relation to them within the 25-year maximum penalty category. However, in recommending amending the age to 12 rather than 10, the Sentencing Advisory Council had regard to the age that children have the ability to consent to sexual penetration and the age that children are beginning to have sexual intercourse.<sup>52</sup> Ten was regarded as too low because it did not include vulnerable adolescents aged 10 and 11, and 12 was selected because children under 12 generally do not become involved in consensual sexual relationships with children close to their own age.<sup>53</sup> Any concerns about denying a similar-age consent defence to children of 10 and 11 playing

<sup>50</sup> See Law Reform Commission of Western Australia, *Community Protection Act (Discussion Paper)*, above n 49, 85 (citations omitted).

<sup>51</sup> *Crimes Legislation Amendment Act 2010* (Vic) s 3, amending *Crimes Act 1958* (Vic) ss 45(2)(a)–(c), 45(3)(a), 45(4).

<sup>52</sup> Sentencing Advisory Council (Vic), *Maximum Penalties for Sexual Penetration with a Child under 16: Report* (2009) 77 [7.21], 79 [7.27].

<sup>53</sup> *Ibid* 76–9 [7.16]–[7.28].

'rude games' is probably answered by the fact that the 'rude games' scenario tends to apply to children who are below the age of criminal responsibility.

B *Restricting the Mistake as to Age Defence by a 'No-Defence Age'*

An aspect of the Tasmanian law that differs from other Australian jurisdictions is the fact that the defence of a reasonable mistake as to age is available to men (and women) of any age who have sex with a young person no matter how great the disparity in age. So, in theory, a man of 50 can have sexual intercourse with a girl of 12 or even younger and still claim the defence of mistake as to age. Indeed, in the child prostitution case mentioned in the introduction, one of the male clients who admitted to sex with the girl was aged 49, and Martin, the one male who was convicted of having sex with her, was 51 at the time.<sup>54</sup> This aspect of the case gave rise to some controversy. The Director of Public Prosecution's explanation for not prosecuting the men who had admitted sexual intercourse with the girl, namely that there was no reasonable prospect of conviction on the facts because of the availability of the defence of mistake, was criticised in media reports of the case and in the public commentary.<sup>55</sup> The Director's response defending his decision was convincing and was vindicated by the jury's decision in Martin's case. It was argued that such a defence was inappropriate and that the girl's clients should not have been able to escape prosecution. This raises the question whether it is appropriate to limit the defence of mistake by a no-defence age and whether there are other limitations on the imposition of a no-defence age requirement.

A no-defence age for the crime of sexual intercourse with a young person means that the offence is in effect one of absolute liability. The prosecution can prove the offence by proving that the accused had sexual intercourse with a young person who was under the no-defence age, say under the age of 12 (which is the median no-defence age in Australia). Neither a mistake as to age nor consent is a defence. The argument in favour of absolute liability as to age for this offence is that sexual abuse of children is so harmful and so abhorrent that liability without proof of fault is justified. Those who engage in sexual behaviour with young people take the risk that the young person is much younger than they appear and cannot complain if they are mistaken about

<sup>54</sup> Transcript of Proceedings (Sentence), *R v Martin* (Supreme Court of Tasmania, Porter J, 29 November 2011).

<sup>55</sup> Sue Neales, 'Girl-Sex Case Rethink Bid', *The Mercury* (Hobart), 1 October 2010, 3; 'DPP Clarifies Facts in Child-Sex Case', *The Mercury* (Hobart), 2 October 2010, 24; David Killick and Zara Dawtrey, 'Girl-Sex Case Outrage', *The Mercury* (Hobart), 23 November 2011, 1.

age. It is claimed that imposing liability without proof of fault will discourage such risky behaviour and make it easier to hold perpetrators accountable. Absolute liability for sexual intercourse with a person under the age of 13 was supported by Baroness Hale in *R v G*,<sup>56</sup> a controversial English case where a 15-year-old youth was convicted of 'rape of a child under 13' after he had sexual intercourse with a girl of 12 who admitted she had told him she was 14. Baroness Hale argued:

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 the state of his mind may again be relevant to sentence). He also commits an offence if he behaves in the same way towards 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, not only an instrument of great pleasure, but also a weapon of great danger.<sup>57</sup>

Before these arguments in favour of a no-defence age are evaluated, the traditional criminal law arguments against imposing criminal liability without proof of fault will be discussed in the context of imposing absolute liability for sexual intercourse with a young person below the no-defence age. It is generally conceded that absolute liability may be acceptable for regulatory offences but it is argued that it is quite inappropriate and unjust for an imprisonable offence, particularly one which attracts such grave public opprobrium as sexual penetration of a child.<sup>58</sup> Arguments against absolute liability for such offences have also been placed in a human rights context by calling in aid basic human rights principles.

### 1 *A No-Defence Age Is Contrary to the Fundamental Presumption of Mens Rea*

At a theoretical level, contemporary criminal law strongly favours a subjective approach to criminal liability. In the context of the offence of sexual inter-

<sup>56</sup> [2009] 1 AC 92.

<sup>57</sup> *Ibid* 108 [46].

<sup>58</sup> Andrew Ashworth, 'Should Strict Criminal Liability Be Removed from All Imprisonable Offences?' (2010) 45 *Irish Jurist* 1. See also Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2012) 143.

course with a young person, a subjective approach demands proof by the prosecution that the accused knew the young person was underage or was at least reckless as to that fact. There is strong judicial support for a subjective approach to criminal responsibility, which is embodied in the common law presumption that mens rea is an essential element of every criminal offence. This is exemplified in Australia by the decision in *He Kaw Teh v The Queen* ('*He Kaw Teh*'),<sup>59</sup> where the High Court gave new life to the presumption of mens rea, insisting that the presumption remained a strong one which could only be displaced by the express words of the relevant offence provision or the subject matter of the offence.

In the United Kingdom, the influence of subjectivism has strongly emerged in interpreting statutory child sexual offences. In *B v Director of Public Prosecutions*,<sup>60</sup> the House of Lords read the requirement of knowledge of the child's age into the offence of indecency with a child under 14. It did the same in relation to the crime of indecent assault of a girl under 16 in *R v K*, where Lord Steyn described the presumption of mens rea as a 'constitutional principle' that is not easily displaced by the language of the statute.<sup>61</sup> In *CC v Ireland*, Denham J of the Supreme Court of Ireland referred to the presumption as the 'silken thread in the fabric of the legal system ensuring a just process' in a case where he found the presumption of mens rea was not ousted for the crime of unlawful carnal knowledge of a female under the age of 15.<sup>62</sup> The presumption has long been regarded as a fundamental principle of justice. To quote a frequently quoted passage from Lamer J's judgment in the Canadian Supreme Court's decision in *Re BC Motor Vehicle Act*:

It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognised as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*.<sup>63</sup>

<sup>59</sup> (1985) 157 CLR 523.

<sup>60</sup> [2000] 2 AC 428.

<sup>61</sup> [2002] 1 AC 462, 477.

<sup>62</sup> [2005] 4 IR 1, 25 [40].

<sup>63</sup> [1985] 2 SCR 486, 513 (Lamer J for Dickson CJ, Beetz, Chouinard, Lamer and Le Dain JJ), quoted in *R v Stevens* [1988] 1 SCR 1153, 1175 (Wilson J for Lamer, Wilson and L'Heureux-Dubé JJ) and *R v Hess* [1990] 2 SCR 906, 915 (Wilson J for Lamer CJ, Wilson, La Forest and L'Heureux-Dubé JJ).

Relying upon H L A Hart and Joseph Raz, Ashworth has explained mens rea's foundational concepts of dignity and the rule of law. He states that the rule of law or respect for human dignity and autonomy 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 the value of individual autonomy which the law should respect.<sup>64</sup> This is linked with 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 to the exercise of state coercion against them, only if they knowingly cause or risk causing prohibited harm.'<sup>65</sup> Ashworth also uses a censure-based argument to support the importance of the principle of mens rea. This asserts that a requirement of fault should be a precondition of the public condemnation involved in conviction and liability to state punishment.<sup>66</sup> In summary:

Either separately or in combination, the rule of law and censure-based arguments provide convincing reasons for regarding strict liability as wrong in principle. The rule of law rationale links with the criminal law's function of guiding behaviour and the censure-based rationale links with the criminal conviction's function of expressing official censure.<sup>67</sup>

As a principle of statutory interpretation, the presumption of mens rea may be rebutted by the words of the statute, either expressly or by necessary implication. 'Necessary implication' leaves room for argument and depends on 'the nature of the offence, the mischief sought to be prevented and any other circumstances which may assist in determining what intention is properly to be attributed to Parliament when creating the offence.'<sup>68</sup> Whether putting the defendant under a less protective form of liability would assist in the enforcement of the offence was listed by Gibbs CJ in *He Kaw Teh* as a major interpretive consideration.<sup>69</sup> In *CTM v The Queen*<sup>70</sup> the High Court took a somewhat different approach when interpreting the offence of sexual intercourse with a person aged between 14 and 16 contrary to the *Crimes Act*

<sup>64</sup> Ashworth, 'Strict Criminal Liability', above n 58, 5–6.

<sup>65</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6<sup>th</sup> ed, 2009) 155.

<sup>66</sup> *Ibid* 6–7, 155.

<sup>67</sup> Ashworth, 'Strict Criminal Liability', above n 58, 7. Note the term 'strict liability' is used in England to mean what would be called absolute liability in Australia and Canada.

<sup>68</sup> *B v DPP* [2000] 2 AC 428, 464 (Lord Nicholls).

<sup>69</sup> (1985) 157 CLR 523, 529–30.

<sup>70</sup> (2008) 236 CLR 440.



1900 (NSW) s 66C(3). Rather than starting with the presumption of mens rea, in their joint judgment Gleeson CJ, Gummow, Crennan and Kiefel JJ began with the principle in *R v Tolson* that 'at common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence.'<sup>71</sup> Construing the section in light of this principle, the joint judgment held that an honest and reasonable belief that the other party to the sexual activity is above the age of 16 years is an answer to a charge under s 66C(3).<sup>72</sup> Parliament had failed to abrogate that principle by express language or necessary implication. Amendments that included removing the express statutory defence of mistake as to age for the crime of sexual intercourse with a young person between the ages of 10 and 16 where the child to whom the charge related consented and was of or above the age of 14 did not provide the necessary implication.<sup>73</sup> In the absence of 'the clearest and most indisputable evidence'<sup>74</sup> the common law principle was not displaced. The decision has been criticised for its failure to apply the common law presumption of mens rea and has been said to be unjustifiable by reference to criminal law theory and the common law. Hodson argues the High Court should have started with the fundamental presumption of mens rea and found that the offence required proof of knowledge that the young person was under the age of 16.<sup>75</sup>

In Code jurisdictions such as Tasmania, the common law presumption of mens rea has no application as a principle of interpretation.<sup>76</sup> Nevertheless the general principle that there should be no liability without fault remains relevant in considering whether the general defence of honest and reasonable mistake is open.<sup>77</sup> And as an aspirational principle, the presumption of mens rea is relevant when criminal offences are being enacted — it weighs heavily against creating offences of absolute liability.

<sup>71</sup> Ibid 445 [3], quoting *R v Tolson* (1889) 23 QBD 168, 181.

<sup>72</sup> *CTM v The Queen* (2008) 236 CLR 440, 456 [35].

<sup>73</sup> Ibid 452–6 [22]–[35].

<sup>74</sup> Ibid 446 [4], quoting *R v Tolson* (1889) 23 QBD 168, 182.

<sup>75</sup> Susannah Hodson, 'CTM v The Queen: A Challenge to the Fundamental Presumption of Mens Rea' (2010) 34 *Criminal Law Journal* 187.

<sup>76</sup> *Bennett v The Queen* [1991] Tas R 11, 18 (Green CJ).

<sup>77</sup> See, eg, *Criminal Code* (Tas) s 14.

## 2 *Is a No-Defence Age an Infringement of Human Rights?*

Victoria and the ACT are the only Australian jurisdictions with human rights charters.<sup>78</sup> This does not mean human rights are irrelevant in evaluating legislative provisions in other Australian jurisdictions. On the contrary, compliance with human rights is a useful evaluative measure and law reform proposals should aspire to be human rights compliant.

Absolute liability with respect to the element of age of the complainant in child sexual offences has been challenged on human rights grounds in a number of common law jurisdictions that have human rights legislation. In Canada the crime of sexual intercourse with a young person under the age of 14 expressly provided that neither consent nor mistake as to age was a defence. It was challenged in *R v Hess*<sup>79</sup> on the grounds that it breached the right to liberty in s 7 of the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'). The statute clearly demonstrated a legislative decision to remove the mens rea requirement.<sup>80</sup> However, the Canadian courts have determined that the right to liberty in s 7 of the *Charter* has elevated the requirement of mens rea from a presumption of statutory interpretation to a constitutionally mandated element of a criminal offence. The right to liberty in s 7 'prohibits the existence of offences that are punishable by imprisonment and that do not allow the accused as a minimum a due diligence defence'.<sup>81</sup> As decided by the majority in *R v Hess*, the infringement of the right to liberty (entailed by making liability absolute with respect to the age of the young person for the crime of sexual intercourse with a young person under the age of 14) was not saved by s 1 of the *Charter* as a reasonable and justifiable limit on that right.<sup>82</sup>

Absolute liability for the crime of sexual intercourse with a young person has also been successfully challenged in Ireland. In *CC v Ireland* a 19-year-old was charged with the crime of having carnal knowledge of a girl under 15 contrary to s 1(1) of the *Criminal Law (Amendment) Act 1935* (Ireland).<sup>83</sup> The defendant admitted consensual sexual intercourse with the girl and said that

<sup>78</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT).

<sup>79</sup> [1990] 2 SCR 906.

<sup>80</sup> *Ibid* 913 (Wilson J for Lamer CJ, Wilson, La Forest and L'Heureux-Dubé JJ).

<sup>81</sup> *Ibid* 916, quoting *R v Stevens* [1988] 1 SCR 1153, 1177 (Wilson J for Lamer, Wilson and L'Heureux-Dubé JJ). See also *R v Vaillancourt* [1987] 2 SCR 636, 652 (Lamer J for Dickson CJ, Estey, Lamer and Wilson JJ); *Re BC Motor Vehicle Act* [1985] 2 SCR 486, 521 (Lamer J for Dickson CJ, Beetz, Chouinard, Lamer and Le Dain JJ).

<sup>82</sup> *R v Hess* [1990] 2 SCR 906, 919–26 (Wilson J).

<sup>83</sup> [2006] 4 IR 1.

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 (by a majority) that the presumption of mens rea had been rebutted by necessary implication from its legislative antecedents and a mistaken belief as to the complainant's age was not a defence.<sup>84</sup> Having failed on the statutory interpretation argument, the constitutional point was argued by the applicant and it was held that by removing the requirement of mens rea in relation to age, the offence was unconstitutional because it was inconsistent with the applicant's personal rights to liberty and good name in art 40 of the *Constitution of Ireland*. In Hardiman J's words, quoting in part those of Wilson J in *R v Hess*:

It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed 'to inflict a grave injury on that person's dignity and sense of worth' and to treat him as 'little more than a means to an end' ... It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the *Constitution*.<sup>85</sup>

In England, the *Convention for the Protection of Human Rights and Freedoms* ('*European Convention*')<sup>86</sup> has proved less useful in challenging offences of absolute liability where Parliament has made its intention plain. In *G v United Kingdom*<sup>87</sup> one of the principal arguments was that to impose absolute liability as to age for the crime of rape of a child under the age of 13 in s 5 of the *Sexual Offences Act 2003* (UK) c 42 was contrary to the right to a fair trial and presumption of innocence in art 6 of the *European Convention*. The European Court of Human Rights, endorsing the decision of the House of Lords, held that Parliament's decision not to make a defence available based

<sup>84</sup> Ibid. Justice Denham dissented. He held that the requirement of mens rea was not expressly excluded by the words of the statute nor by necessary implication. The legislative history did not make it compellingly clear that the fundamental 'constitutional concept' of mens rea was ousted and that a 'reasonable belief' as to the age of the complainant was a defence: at 27 [49], 34 [65]. In relation to *PG v Ireland*, a case heard at the same time, it was unanimously held that for the common law offence of sexual assault of a person under the age of 15 the presumption of mens rea applies and mistake as to age, a 'genuine' mistake, 'without it having to be objectively reasonable', was a defence: at 49 [121] (Geoghegan J).

<sup>85</sup> *CC v Ireland* [2006] 4 IR 1, 78–9 [44], quoting *R v Hess* [1990] 2 SCR 906, 918.

<sup>86</sup> Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>87</sup> [2009] 1 AC 92. See also Andrew Ashworth, 'Human Rights: *G v United Kingdom*' [2012] *Criminal Law Review* 46.

on a reasonable belief that the complainant was aged 13 or over did not give rise to any issue under art 6 because it was not the court's role under arts 6(1) or (2) to

dictate the content of domestic criminal law, including whether or not a blameworthy state of mind should be one of the elements of the offence or whether there should be any particular defence available to the accused ...<sup>88</sup>

### 3 *Is a No-Defence Age a Deterrent?*

Despite strong judicial endorsement of the importance of mens rea as a foundational principle of justice, there is some support for making exceptions even in the case of offences that are seen as truly criminal, such as child sexual offences. Deterrence is one argument that is used to justify such exceptional criminal liability. Despite the injustice of a provision with the potential to punish an accused in the absence of a guilty mind, it is justified by the greater good of protecting young people from premature sexual activity by deterring it. It is argued that if criminal liability for sexual intercourse with a 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. This assumes that the age of a person with whom one is contemplating sex is a matter to which one addresses attention and that to avoid the risk of conviction, one would refrain from having sex with a person unless one was certain that they were over the age of consent. In *R v Hess*, McLachlin J, in her dissenting judgment, was convinced of the deterrent effect of absolute liability in this context:

The defence of due diligence would require him to make enquiries 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 many conclude that they will not take the chance. That wisdom forms part of the substratum of consciousness with which young men grow up, as exem-

<sup>88</sup> *G v United Kingdom* (European Court of Human Rights, Chamber, Application No 37334/08, 30 August 2011) [27] (citations omitted).

plified by terms such as ‘jail-bait’. There can be no question but that the imposition of absolute liability in s 146(1) has an additional deterrent effect.<sup>89</sup>

Justice Wilson, in the same case, was not persuaded that absolute liability would have a greater deterrent effect than strict liability:

Where one is dealing with the potential for life imprisonment it is not good enough, in my view, to rely on intuition and speculation about the potential deterrent effect of an absolute liability offence. We need concrete and persuasive evidence to support the argument.<sup>90</sup>

Nor was Hardiman J in *CC v Ireland* convinced:

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, as far as one can tell in the Canadian case and certainly in this case.<sup>91</sup>

Accepting a deterrent effect assumes one will consider the risks and weigh up the risk of being wrong and of being detected and punished. Whether these risks are indeed in the substratum of consciousness is speculative. As well as arguing that the increased deterrent effect of absolute liability compared with an offence which requires proof of negligence is speculative and unsupported by any evidence, Ashworth argues there are principled arguments against deterrence even if it were established that dispensing with fault would have a greater deterrent effect. Making a scapegoat of a person in order to discourage others is unfair.<sup>92</sup> As Wilson J in *R v Hess* put it, ‘[i]t is to use the innocent as a means to an end.’<sup>93</sup>

#### 4 Making Prosecution Easier

One of the arguments in favour of absolute liability is that it makes it easier to hold offenders accountable. The defence of mistake as to age is ‘all too easy to claim’ when no such mistake existed and ‘some men specialise in the targeting

<sup>89</sup> *R v Hess* [1990] 2 SCR 906, 950.

<sup>90</sup> *Ibid* 923.

<sup>91</sup> [2006] 4 IR 1, 84 [59]–[60], quoting *R v Hess* [1990] 2 SCR 906, 950 (McLachlin J).

<sup>92</sup> Ashworth, ‘Strict Criminal Liability’, above n 58, 12–13.

<sup>93</sup> [1990] 2 SCR 906, 924.

of young girls'.<sup>94</sup> Moreover, because age is difficult to ascertain, a belief that the young person was much older can be a reasonable claim.<sup>95</sup> This kind of argument was questioned 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 great measure, if not entirely, to a mistrust 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 a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and humane criminal code.<sup>96</sup>

The argument can also be countered by making it less easy to raise the defence of mistake by placing some weight on the defendant to demonstrate that he took sensible precautions. Qualifications on the defence of mistake will be considered below.

### 5 *The 'Thin Ice Principle'*

As Baroness Hale argues in the passage quoted above from *R v G*,<sup>97</sup> a person who has sex with a young person takes the risk that she is younger than he thinks she is. Similarly, in *Wisconsin v Jadowski*,<sup>98</sup> Abrahamson CJ defended absolute liability for 'statutory rape' on the grounds that the statutory prohibition in such cases is not hidden, and the 'defendant is warned to steer well clear of the core of the offense.' Underlying this point is the assumption that being involved in sexual activity with a young person is morally dubious and attended with well-known risks and people cannot really complain when the risk materialises. This has sometimes been referred to as the 'thin ice princi-

<sup>94</sup> Home Office (UK), 'Setting the Boundaries: Reforming the Law on Sex Offences' (Consultation Paper, Home Office, July 2000) vol 1 46–7 [3.6.12].

<sup>95</sup> *Wisconsin v Jadowski*, 680 NW 2d 810, 817 [25] (Abrahamson CJ) (Wis, 2004).

<sup>96</sup> (1937) 59 CLR 279, 309.

<sup>97</sup> [2009] 1 AC 92, 108 [46].

<sup>98</sup> 680 NW 2d 810, 821 [44] (Wis, 2004), quoting Chief Judge Posner in *United States v Wilson*, 159 F 3d 280, 296 (7<sup>th</sup> Cir, 1998) (dissenting).

ple': '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>99</sup> Ashworth rejects the thin ice argument in the context of sexual penetration of a young person. His reasoning is that though we may strongly disapprove of older men having sex with 17-year-olds, 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 in so far 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>100</sup>

#### 6 *Absolute Liability Is Justified by the Seriousness of the Harm*

Irrespective of deterrence and proof that absolute liability will increase the protection the law offers to young people from sexual exploitation, it can be argued that sexual conduct with a young person is so harmful and so reprehensible that society should condemn it without proof of fault to reinforce society's condemnation of such conduct. For this argument, a no-defence age is supported without reliance on its preventive efficacy. But as Ashworth points out, the seriousness of the offence cuts both ways: 'The harm is very serious for the victim, but to register a conviction without culpability as to this material element is also a great injustice for the defendant.'<sup>101</sup> He argues that conviction is an act of public censure of the individual, 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).<sup>102</sup>

That prosecutorial or judicial discretion can counter any chance of injustice in individual cases was also refuted by Wilson J in *R v Hess*:

one cannot leave questions of mental innocence to the sentencing process. The legislature must take into account the implications of the distinction between the mentally innocent and the mentally guilty when drafting legislation. Any flaws in the provision cannot be justified by arguments that ask us to have faith

<sup>99</sup> Ashworth, 'Strict Criminal Liability', above n 58, 13, quoting *Kneller v DPP* [1973] AC 435, 463 (Lord Morris).

<sup>100</sup> Ashworth, 'Strict Criminal Liability', above n 58.

<sup>101</sup> *Ibid* 14.

<sup>102</sup> *Ibid* 15.

that the prosecutor and judge will take these flaws into account when deciding how the accused will be punished. Reliance on prosecutorial or judicial discretion to mitigate the harshness of an unjust law will provide little comfort to the mentally innocent and cannot, in my view, serve to justify a fundamentally unsound provision.<sup>103</sup>

### C. Other Restrictions on the Mistake as to Age Defence

So far it has been argued that a no-defence age for child sexual offences such as sexual intercourse with a young person is not defensible. It is both contrary to fundamental principle and unjust to make liability absolute for such a serious offence. Serious harm is undoubtedly caused by these offences and children need to be protected from them, but arguments that absolute liability when the person the subject of the charge is under the no-defence age will have a greater deterrent effect than strict liability is merely speculative. The suggestion that injustice is likely because ‘a child under 13 [is] not readily mistaken for one over 16’,<sup>104</sup> is challenged by the Tasmanian case that gave rise to the review of defences to sexual offences against young people in that State. The child in that case was 12 but advertisements for her services described her as ‘New in town, Angela 18 years old’.<sup>105</sup> The Director of Public Prosecutions’ published memorandum, which explained his reasons for not prosecuting those clients who admitted to having sex with the girl, suggested that the ‘complainant does look much older than her 12 years’.<sup>106</sup> This is confirmed by the judge’s comments in imposing sentence on the one client who was prosecuted and convicted for having sexual intercourse with the girl — he accepted that on the evidence at trial, ‘reasonable grounds existed for thinking that the complainant was about 15, possibly 16 years old’.<sup>107</sup>

Rather than imposing absolute liability where the child is under 10, 12 or 13, a better approach may be to focus on narrowing the defence of mistake. It seems to be common for young people to lie about their age in order to

<sup>103</sup> [1990] 2 SCR 906, 924.

<sup>104</sup> Home Office (UK), above n 94, 45 [3.6.7].

<sup>105</sup> See Transcript of Proceedings (Sentence), *R v Martin* (Supreme Court of Tasmania, Porter J, 29 November 2011). See also Tasmania Law Reform Institute, *Sexual Offences against Young People*, Issues Paper No 17 (2012) 3 [1.1.9].

<sup>106</sup> ‘DPP Clarifies Facts in Child-Sex Case’, *The Mercury* (Hobart), 2 October 2010, 24.

<sup>107</sup> Transcript of Proceedings (Sentence), *R v Martin* (Supreme Court of Tasmania, Porter J, 29 November 2011). The defendant in this case had a much better opportunity to clearly observe the girl than the men who were not prosecuted — they had sex with her in a dimly lit room.



engage in things that the law proscribes. And in the context of underage drinking and juvenile prostitution, false identification is not uncommon. Given this reality, there are grounds for arguing that some limits on the defence of mistake as to age may be justified. While some would argue that fundamental principle requires that a mistaken belief need only be honest, in the context of child sexual offences, such a defence would not provide sufficient protection for children. It is too easy to claim an honest mistake when no such mistake existed. Nor would such an exemption send the right message to the community about the need to be vigilant about protecting children from sexual abuse and exploitation. Code jurisdictions are much more comfortable about substituting the defence of reasonable mistake for knowledge requirements, as their rape laws indicate.<sup>108</sup> It is accepted that there is nothing unjust in requiring a person to take reasonable steps to ensure that their sexual partner is consenting.<sup>109</sup>

### 1 Age Restrictions on Perpetrators

One possibility is to restrict the upper age of a defendant who can argue a mistake as to age on the grounds that a greater age disparity is an indication of exploitation. This is the position in Western Australia — the defence is restricted to perpetrators who are no more than three years older than the complainant, who must be at least 13.<sup>110</sup> Other jurisdictions have had age-restricted mistake as to age defences in the past. For example, in the United Kingdom, what was known as the ‘young man’s defence’ to the crime of unlawful carnal knowledge of a girl of or over 13 and under 16 was introduced in 1922 for defendants who were under the age of 24 and charged for the first time.<sup>111</sup> A similar defence found its way into the Tasmanian *Criminal Code*, restricted, however, to an accused under the age of 21,<sup>112</sup> and the *Crimes*

<sup>108</sup> Bronitt and McSherry, above n 46, 656.

<sup>109</sup> *Ibid* 658–62.

<sup>110</sup> *Criminal Code* (WA) s 321(9).

<sup>111</sup> *Criminal Law Amendment Act 1922*, 13 Geo 5, c 2. See *R v K* [2002] 1 AC 462, 469 [10] (Lord Bingham); Home Office (UK), above n 94, 46 [3.6.9]. The *Sexual Offences Act 2003* (UK) c 42, s 9 replaced the ‘young man’s defence’ with a generally available defence of honest and reasonable mistake as to age for the offence of sexual activity with a child over the age of 13 and under the age of 16.

<sup>112</sup> *Criminal Code* (Tas) s 124(3)(a). This was further restricted to an accused under the age of 18 when the age of consent was lowered from 18 to 17 by *Criminal Code Act 1974* (Tas) s 2. The age restriction was omitted from the redrafted offence in the amendments.

*Act 1961* (NZ) had an age-restricted mistake as to age defence, which has been repealed.<sup>113</sup>

There are strong grounds for rejecting an age-restricted mistake as to age defence. The most convincing reasons relate to the objections to absolute liability discussed above because it means, in effect, that the offence of sexual intercourse with a young person is an absolute liability offence for all defendants who are over the age limit. Other criticisms of age restrictions on the defence include that it is arbitrary and has the effect of denying the defence to a person who is one day over the age limit and that it is unfair because mistakes are no less likely to be made by older men. The ability to differentiate age is said to be likely to diminish with age rather than increase.<sup>114</sup> The counter-argument is that increased age requires greater responsibility and on this basis a defence limited by age can be justified. However, I would argue that considerations such as age disparity between the offender and the complainant would be better accommodated by a generally available mistake as to age defence with a reasonable steps requirement than by an age-limited mistake defence.

## 2 *Adding a Requirement to Take Reasonable Steps*

Both Canada and New Zealand have introduced a reasonable steps requirement to the defence of mistake. In Canada, the defence of mistake is not available for child-specific sex offences 'unless the accused took all reasonable steps to ascertain the age of the complainant.'<sup>115</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 these steps were all that could have been reasonably required of him in the circumstances.'<sup>116</sup> What is reasonable will depend on the circumstances, and in some cases a visual observation may suffice.<sup>117</sup> However,

<sup>113</sup> *Crimes Act 1961* (NZ) s 134, as amended by *Crimes Amendment Act 2005* (NZ) (2005) s 7.

<sup>114</sup> New Zealand, *Parliamentary Debates*, House of Representatives, 12 April 2005, 20 016 (Marc Alexander); Criminal Law Revision Committee, 'Fifteenth Report: Sexual Offences' (Parliamentary Paper 9213, Home Department, April 1984) 46.

<sup>115</sup> *Criminal Code* (Canada) s 150.1(4). The onus is the prosecution to prove the accused did not take reasonable steps or did not have an honest belief: *R v LTP* (1997) 113 CCC (3d) 42 [19] (Finch JA for Lambert, Esson and Finch JJA).

<sup>116</sup> *R v Osborne* (1992) 17 CR (4<sup>th</sup>) 350 [62] (Goodridge CJN for Goodridge CJN, O'Neill and Steele JJA).

<sup>117</sup> *R v LTP* (1997) 113 CCC (3d) 42 [20] (Finch JA for Lambert, Esson and Finch JJA).

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>118</sup>

Following amendments to the *Crimes Act 1961* (NZ) in 2005, it is only a defence to a charge of sexual conduct with a person under the age of 16 if the accused can prove that he or she 'had taken reasonable steps to find out whether the young person was of or over the age of 16 years' in addition to proving that he or she believed on reasonable grounds that the young person was of or over 16.<sup>119</sup>

An advantage of the reasonable steps requirement is that it puts a greater onus on the defendant to ascertain the child's age than the defence of honest and reasonable mistake as to age. What constitutes reasonable steps will depend on the circumstances. In the context of child prostitution it should not be possible to say, for example, that 'I thought she was 18 because she was advertised as being 18, she looked much older than her 12 years and it was dark and hard to see clearly'.<sup>120</sup> In this context, misrepresentation of age and even false identification is common. Considerable care is required to ensure that sexual services are being provided by an adult. In other situations, such as a meeting in a bar or nightclub, presence in licensed premises should not be enough to form the basis for the defence given the frequency with which under-age teenagers are illegally present. Arguably, the greater the age disparity, the greater the care that is needed, given that it is likely that determining age diminishes with maturity. And what are reasonable steps could also depend on the sexual conduct proposed; less may be required for sexual acts falling short of penetration.

#### IV CONCLUSION

In most respects, the Tasmanian law in relation to sexual intercourse with a young person achieves a reasonable balance between the need to protect

<sup>118</sup> Ibid [18], referring to *R v RAK* (1996) 106 CCC (3d) 93; *R v RSM* (1991) 69 CCC (3d) 223.

<sup>119</sup> *Crimes Act 1961* (NZ) s 134A(1), as amended by *Crimes Amendment Act 2005* (NZ) s 7. Similar qualifications to the defence of mistake as to age are sometimes found in offences dealing with child prostitution: see, eg, *Sex Industry Offences Act 2005* (Tas) s 9(4).

<sup>120</sup> These points formed the reasonable grounds for the claimed mistakes as to age in the Tasmanian child prostitute case: see Transcript of Proceedings (Sentence), *R v Martin* (Supreme Court of Tasmania, Porter J, 29 November 2011); Tasmania Law Reform Institute, *Sexual Offences against Young People (Final Report)*, above n 1, 59–60 [4.4.10].

young people and the need for criminal laws that are fair and just. One of the problems with child sex offence laws is that they over-criminalise by making sexual experimentation and peer relationships between adolescents and teenagers criminal. The focus in this article on sexual penetration in the discussion of the current law obscures the fact that the law also proscribes less intrusive sexual acts such as sexual touching, a point that strengthens the argument as to over-criminalisation. Our child sex offence laws put young people at risk of prosecution and conviction, and make them subject to mandatory inclusion on sex offence registers for peer sexual conduct. By providing reasonably generous similar-age consent defences, the Tasmanian law avoids this without diminishing the protection provided to children.

Criticisms of the Tasmanian law have been reported in the media because the absence of a no-defence age allows an accused to rely upon the defence of mistake as to age irrespective of the age of the child. It is said this 'loophole' fails to make those who have sex with the very young accountable.<sup>121</sup> In this article it has been argued that there is no evidence that a no-defence age will increase the level of protection provided to young people from sexual abuse, and that to create an offence that makes a defendant liable to conviction for an imprisonable offence in the absence of fault is grossly unfair. Rather than introducing a no-defence age, a better approach would be to adopt the Canadian and New Zealand position and tighten the defence of honest and reasonable mistake by adding a reasonable steps requirement. With this addition, the Tasmanian defences of consent and mistake as to age provide a good model for the rest of Australia for the crime of sexual penetration of a young person and other child sexual assault offences.

<sup>121</sup> Tasmania Law Reform Institute, *Sexual Offences against Young People (Final Report)*, above n 1, 29 [3.1.1].