SECOND READING SPEECH

Criminal Code Amendment (Sexual Offences Against Young People) Bill 2013

Mr Speaker, as we all recall only too well, a few years ago a twelve-year-old girl was prostituted in Hobart by her mother and her mother's male friend.

In the aftermath of that distressing case, the fact that only one of the girl's clients was prosecuted gave rise to controversy and criticism of the law relating to the crime of sexual intercourse with a young person, in particular in relation to the issue of mistake as to age.

The then Attorney-General responded to the criticism by requesting that the Tasmanian Law Reform Institute conduct a review of the issue of mistake of age and any other legal issues raised by the case.

The Institute published an Issues Paper in May 2012 to allow for wide consultation with the community on the issues it had identified. In October 2012 the Institute released its Final Report.

As I have previously indicated, the Government has accepted the majority of the recommendations made by the Law Reform Institute in that Report, with some modification. I will discuss these modifications as I address the specific amendments in the Bill.

Firstly, the Bill amends the *Criminal Code* to provide that mistake as to age will not absolve an accused from criminal responsibility if the young person against whom the offence was committed is under the age of 13.

This means that if the young person who is the victim of the offence is under the age of 13, anyone accused of committing a sexual offence in relation to that young person will not be able argue that he or she is innocent on the basis of a mistaken belief that the young person was old enough to consent, even if that mistake was honest and reasonable.

The Law Reform Institute was divided on the issue of an age below which mistake could not be raised but a majority of the Institute of did not recommend the introduction of such an age.

The majority believed that a serious offence, such as sexual intercourse with a young person, should always have a fault element, and believed that a jury could be trusted to assess whether a mistaken belief was genuinely held. Further, the majority was not convinced that setting an age would be a substantial deterrent to sexual offences against children.

Notwithstanding the recommendation of the Institute, the Government decided to insert an age below which mistake of age cannot be raised in relation to sexual offences against children.

It is clear from the submissions from the general public and interest groups received by the Institute on the Issues Paper that there is a groundswell of support in Tasmania for such an age.

The Government believes that the setting of such an age is a statement of principle.

Despite the majority recommendation against setting an age below which mistake could not be raised, the Law Reform Institute recommended that the relevant age should be 12, if the decision was made to introduce one.

However, the Government has decided to make the relevant age 13, meaning that it will apply to young people below that age – that is children of 12 or younger.

The Government considered that the age of 12 was too young, as it would only prevent mistake as to age being arguable where the young person was 11 years old or younger.

The Government believes that 13 is the most suitable cut-off point as it is the average age for the onset of puberty and also the age at which children are in the first year of secondary school.

The second change made by the Bill is the insertion of a requirement that for mistake as to age for young persons between the ages of 13 and 17 to be found to be honest and reasonable the accused must have taken all reasonable steps to ascertain the actual age of the young person and the mistake must not be one made as a result of the self-induced intoxication of the offender.

The Law Reform Institute recommended that taking all reasonable steps should be a prerequisite to raising mistake as to age on the basis that anyone who is contemplating sexual activity with a young person should have a duty to ensure that the young person is over the legal age for consent.

The requirement that a defendant must take all reasonable steps to ascertain a young person's age in order to argue that his or her mistake was honest and reasonable will counter any perception that mistake is easy for a defendant to claim and hard to disprove.

The provision that the mistake will not be honest and reasonable if it results from the self-induced intoxication of the offender and is not one that the offender would have made if sober mirrors a similar provision in section 14A of the *Code*.

It covers a situation, for example, where the offender may have made reasonable inquiries but has misunderstood a response to the inquiries because of intoxication.

The amendments will emphasise that young people in this State are protected from sexual exploitation.

The third amendment made by this Bill is to remove the inconsistencies in how mistake as to age is dealt with in the various provisions relating to sexual offences against young persons and the resulting differences in the onus of proof.

These inconsistencies were highlighted in the *The Queen v Martin* (2011) case where the onus of proof for mistake differed between the offences

charged, as a result of which the judge was required to direct the jury in different and apparently contradictory ways.

There is no principled reason for the current differences in the treatment of mistake in these provisions and they create unnecessary complexity and the potential to confuse a jury.

This Bill removes the inconsistencies by removing all the specific statutory defences of mistake as to age. As a result, the common law in respect to mistake will apply as qualified by new section 14B.

The onus of disproving an honest and reasonable mistake as to the age of the young person is therefore on the Crown, consistent with the majority recommendation of the Law Reform Institute.

As part of this onus, it will be for the prosecution to prove that the defendant did not take all reasonable steps to ascertain the age of the young person.

Placing the onus of proof on the prosecution is an application of general principles. In the common law system, the general rule is that the prosecution must prove beyond reasonable doubt all elements of the crime.

To place the onus of proof on the defendant would be contrary to the common law presumption of innocence and the decision of the High Court in *He Kaw Teh* (1985) and may amount to an infringement of the presumption of innocence in art 14(2) of the *International Covenant on Civil and Political Rights* if the infringement cannot be justified.

The fact that the mistaken belief about age is peculiarly within the defendant's knowledge is not an argument for reversing the onus of proof. Intent is also within the peculiar knowledge of the defendant and yet the prosecution is generally always required to prove intent.

If the onus of proof was placed on the defendant it would force the defendant into the witness box to give evidence thereby denying the defendant the right to remain silent.

Fourthly the Bill clarifies that it will be possible to claim a mistake as to age as well as a defence based on consent where there is a similarity in age between the parties.

A majority of the Law Reform Institute recommended that the *Code* be amended so that the defence of mistake as to age could not be combined with age similarity consent defences.

This recommendation seems to be largely based on the fact that combining the defences could extend the specifically stipulated age ranges where consent is a defence.

However, there are potent arguments in favour of amending the *Code* to allow the claim of mistake as to age to be combined with age similarity consent defences.

It would be unfair, as the Institute itself points out in its Report, if a 60-year-old who mistakenly believes a 15-year-old is 17 could raise the issue of mistake but an 18-year-old who mistakenly believes a 14-year-old is 16 could not.

The age similarity consent defences in the *Code* are based on a realistic understanding that a sizeable percentage of teenagers will engage in sexual relations including sexual intercourse.

Young people are in greater social contact with each other and therefore more likely to consensually enter sexual relations in the mistaken belief that their sexual partner is older than they in fact are. In general, the wider community is more tolerant of consensual sexual intercourse between persons who are close in age.

Given that mistake as to age cannot be raised if the young person in question is under the age of 13, combining the issue of mistake with the age similarity consent defences will not result in children below 13 being at greater risk of sexual exploitation.

The Government has therefore not accepted the Institute's recommendation and this Bill inserts a provision to clarify that mistake as to age can be relied on in respect of an age-similarity consent defence.

The combination of these provision recognises the vulnerable status of young people and ensures their protection.

The fifth amendment made by this Bill is one that was not addressed in the Issues Paper but was raised by the Department of Police and Emergency Management in its submission to the Law Reform Institute. The Institute's Final Report mentioned the issue but made no recommendation as it was not a matter consulted on.

In 1997, when homosexuality was decriminalised by the repeal of s 122 and 123 of the *Code*, the operation of s 124 was made retrospective by the insertion of s 124(4). This ensured that sexual intercourse with a male under the age of 17 occurring before the repeal of s 122 could still be prosecuted. At the same time subsection 124(5) (which provides that the age similarity defences do not apply to anal sexual intercourse) was included.

Section 124(5) discriminates on the basis of sexuality as young homosexual males are prohibited from experimenting with anal sex whereas young heterosexual males and either heterosexual or homosexual females can legally have sexual intercourse (other than anal sex) in cases where the age similarity defences apply.

Tasmania Police noted this discrepancy in its submission to the Institute and recommended consideration be given to the repeal of the subsection.

It is important to recognise that young persons may experiment sexually in their early teens – they may identify as same sex or heterosexual early or explore a range of sexual identities and practices.

Section 124(5) appears to promote the myth that young persons may be "seduced" or "corrupted" into homosexuality if allowed to experiment when under the age of 17.

This may have been a view held by some sections of society at the time when homosexuality was decriminalised in 1997, but it has since been completely discredited.

The Tasmanian public has a far greater acceptance of the divergence of sexual orientations and practices in society than was the case 15 years ago, to the extent that the Government has been a national leader in same sex law reform since the introduction of the *Relationships Act in* 2003.

It is proposed that section 124(5) be deleted to remove any discrimination against young homosexual or heterosexual couples who may wish to experiment with anal sex.

The Bill also amends section 125A to clarify that an unlawful act or acts committed outside Tasmania can be considered as up to two of the three unlawful acts required to constitute the crime of maintaining a sexual relationship with a young person, provided those acts would be an unlawful sexual act in this state.

At least one of the three unlawful sexual acts that constitute a crime under the section has to have been committed in this State.

Interstate crimes can also be taken into account as additional unlawful acts for the purpose of sentencing.

The amendment will allow consideration of the full extent of the abuse that a young person may have suffered, particularly given that the population is increasingly mobile and may move in and out of states on a regular basis.

The Law Society, while supporting the extension, was concerned that protection should be provided to a defendant so that he or she does not face the possibility of a second set of charges arising out of the 'interstate' conduct, filed in the another jurisdiction.

The Law Reform Institute was satisfied that extending the provision in this way was unlikely to lead to a defendant being convicted in relation to the same offence in two states stating that "the Supreme Court (as a court of superior jurisdiction) has a broad discretion to stay proceedings to prevent abuse of process and the rules against double punishment

prevent an offender being punished twice for the same conduct where the boundaries of offences overlap, notwithstanding that multiple convictions may be technically possible."

The Government agrees with the Institute's view and therefore the amendment is included in the Bill.

The Bill also omits subsection 125A(5) as recommended by the Institute. The omission of the subsection does not prevent mistake as to age, as set out in new section 14B, being raised if it is relevant to a particular unlawful sexual act relied upon to establish the crime.

Finally the Bill includes a new section 460 which sets out that the amendments made by the Act do not apply to an offence committed before the amendments commence.

As the amendments vary the substantive law, the common law position is that they do not apply retrospectively, and this section gives statutory effect to that legal principle.

This Bill deals with the legal and social issues arising from the unfortunate circumstances involving the 12 year old child prostituted by those who should have protected her. It is based on the thorough research of the Tasmanian Law Reform Institute and I would like to express my appreciation for their work in this matter.

I commend the Bill to the House.