Submission to the Tasmania Law Reform Institute

Sexual Offences Against Young People

Bravehearts inc.
Educate Empower Protect Our Kids

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About the Authors

Carol Ronken is Bravehearts' Research and Policy Development Manager. After seven years at Griffith University as a casual staff member and Associate Lecturer in the School of Criminology and Criminal Justice, Carol joined Bravehearts in early 2003. Carol has a Bachelor of Arts (psychology) and Masters in Applied Sociology (social research). In 2011 she received an award from the Queensland Police Service Child Protection and Investigation Unit for her contribution to child protection. Carol has also co-authored *The Bravehearts Toolbox for Practitioners Working with Child Sexual Assault* (Australian Academic Press, 2011).

Hetty Johnston is Founder and Executive Director of Bravehearts Inc. Hetty is the author of the national awareness campaign, "White Balloon Day", the "Sexual Assault Disclosure Scheme", the "Ditto's Keep Safe Adventure!" child protection CD-Rom and her autobiography, "In the best interests of the child" (2004). In 2005, Hetty was announced as a finalist for the 2006 Australian of the Year Awards – she is the recipient of two Australian Lawyers Alliance Civil Justice Awards (2003, 2004) and was named a finalist in the 2008 Suncorp Queenslander of the Year Awards. She was awarded a Paul Harris Fellowship in 2010 and is a Fellow of the Australian Institute of Community Practice and Governance (March 2010). In early 2009, Hetty was recognised as one of approximately 70 outstanding leaders throughout the world, receiving the prestigious annual Toastmasters International Communication and Leadership award.

This submission has been prepared by:
Bravehearts Inc
PO Box 575
Arundel BC, Qld 4214
Phone: 07 5552 3000
E-mail: research@bravehearts.org.au
Web: www.bravehearts.org.au

About Bravehearts Inc.

Founded in 1997 by Hetty Johnston, Bravehearts Inc. has evolved into an organisation whose purpose is to provide therapeutic, support and advocacy services to survivors of child sexual assault. We are also actively involved in education, prevention, early intervention and research programs relating to child sexual assault.

Bravehearts operates from our Head Office on the Gold Coast, advocating and lobbying nationally, with branches across the country.

Bravehearts makes a difference in child protection by:

- Assisting children and their non-offending family members to recover from the trauma of child sexual assault through therapy, advocacy and support;
- Raising awareness via initiatives such as the 'White Balloon Campaign' - a public awareness and child protection initiative;
- Protecting survivors and providing them with avenues of redress through projects like the 'Sexual Assault Disclosure Scheme' (SADS) – a means for anonymous yet official disclosure of assault;
- Providing and developing effective education and prevention programs to empower children and young people and increase their resiliency to child sexual assault;
- Provision of workshops and professional development training for therapists, those who work with children and the general community;
- Advocating for survivor's rights through participation in legislative review and reform (successful campaigns include: the introduction in Queensland, New South Wales, Western Australia, Victoria and South Australia of Continuing Sentences for dangerous paedophiles; the closure of Queensland's Department of Family Services; the introduction of the Amber Alert system in Australia; the instigation of various formal Inquiries; and successful amendments to legislation);
- Raising community awareness through participation in public debate and in the accumulation, production and dissemination of relevant research material; and
- Supporting the work of other agencies (government and non-government) and individuals in their work around child sexual assault.

Introduction

Bravehearts position in relation to age of consent laws and the use of “honest and reasonable mistaken belief” as a defence in relation to child sexual assault matters, is that in order to more effectively protect young people from predators who target the vulnerable and who will exploit the power imbalance between adults and children we need to assure that legislation is in place that is consistent and enforceable.

Age of consent laws are designed to protect young and innocent children from physical and psychological harm caused by engaging in sexual intercourse before he or she is psychologically mature enough to consent to such activity. Consent in this context refers to full, informed consent, where the person is aware of the consequences of giving that consent.

Research shows that children are incapable of “informed” consent in relation to sex with adults because they are children. Children lack the information necessary to make an "educated" decision. It is not only that they may be unfamiliar with the mechanics of sex and reproduction. More important, they are generally unaware of the social meanings of sexuality. For example, they are unlikely to be aware of the rules and regulations surrounding sexual intimacy, what it is supposed to signify. They are uninformed and inexperienced about what criteria to use in judging the acceptability of a sexual partner. They do not know much about the "natural history" of a sexual relationship and what course it may take. And finally, children have little way of knowing how other people are likely to react to the experience they are about to undertake - what likely consequences it will have for them in the future.

Furthermore, the child does not have true freedom to say yes or no in a legal or psychological sense. In a more important psychological sense, children have a hard time saying "no" to adults, the child often has no freedom in which to consider the choice. This lack of freedom is especially true when the adult is a parent or a relative or another important figure in the child's life, as is so often the case.

Adults can intellectually coerce, convince and confuse children and young people. Most of what we see as "consensual" behaviour on the part of children is a response to the powerful incentives and authority that adults hold.

While we recognise the varying maturity levels among young people, it is our position that the current legislation must be focused on protecting children and reducing the risk of young people being exploited.

In relation to the current Inquiry, there is recognition in law that an adult may engage in sexual activity with a young person, under the age of consent, in the honest and reasonable belief that the young person is of age; and that this, if proven, can provide as

a criminal defence. Bravehearts provides the following submission in response to the Discussion Paper prepared by the Tasmania Law Reform Institute.

Question 1
(a) Should there be a no defence age for sexual intercourse with a young person, aggravated sexual assault, indecent assault and indecent act with a young person?
(b) If so what should the no defence age be?

Question 2
(a) Should the defence of mistake as to age be retained?
(b) If yes, should it be retained in relation to all offences, or to some only (and if so, which)?

It is our belief that we need to ensure legislations in place are structured to best protect children from sexual exploitation and harm.

Young children are psychologically unprepared to respond to the innate power imbalance between themselves and adults. Where there is an age discrepancy between a young person and an adult the impact of the power imbalance may be felt by the young person, even where it is not overtly exploited by the adult.

However, we also know that the power imbalance is often used to coerce and/or force participation in, or overcome resistance to, sexual activity, and subsequently used to coerce and/or force silence and inaction by the victim of the sexual assault.

It is Bravehearts position that Tasmanian legislation should retain the defence of *mistake of age*, based on an honest and reasonable belief (see response under Questions 3 and 5) for all sexual offences, but that it should be likewise be amended to include a 'no defence age' of 12 or 13 years (with our preference for 13 years of age).

In addition, we believe that this should be combined with a similarity of age defence, to limit the application of this defence to matters where the accused person is not more than ten years older the victim (see response under Question 4).

That is, we would suggest that laws relating to sexual offences be amended to:

> **"It is a defence to a charge to prove that the accused person was under the honest and reasonable belief that the other person was of, or above, the age of 17 years, where:**
> **(a) That person was of, or above, the age of 13 years; and**
> **(b) The accused person was not more than ten years older than that person; and**
> **(c) Where the other person is between the ages of 13 and 17, the accused person made reasonable steps to confirm the other person's age"**

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)?

We support the retention of the current Tasmanian position; that is that the accused must prove that their belief in relation to the defence of mistake as to age to be both honest and reasonable. That is that the defendant must be able to show both aspects of this defence: (1) the belief must be an honest one and (2) the belief must be shown to be reasonable in the given circumstances.

Both 'honest' and 'reasonable' belief must be clearly defined under legislation.

In addition, as discussed under Question 5., we believe that these requirement for proving an honest and reasonable belief, should be extended when the victim is aged between 13 and 17, to include reasonable steps by the accused to ascertain the age of the young person.

Question 4
(a) Should there be an age restriction on the age of the perpetrator who can claim the defence of mistake as to age?
(b) If yes, what should that age be?

As outlined under Question 1 and 2, it is our position that the defence of mistake of age should be limited to matters where the accused person is not more than ten years older the victim:

> **"It is a defence to a charge to prove that the accused person was under the honest and reasonable belief that the other person was of, or above, the age of 17 years, where:**
> **(a) That person was of, or above, the age of 13 years; and**
> **(b) The accused person was not more than ten years older than that person; and**
> **(c) Where the other person is between the ages of 13 and 17 the accused person made reasonable steps to confirm the other person's age"**

For example, if the accused person had been charged with sexual offences against a 14 year old, and the accused was 30 at the time of the offence, because the age discrepancy between the accused and the victim is greater than 10 years, the mistake of age defence cannot be used.

If however, the accused was 23 years of age, the defence would be available to them as the age discrepancy is less than 10 years.

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?

As outlined above, Bravehearts believes that the 'no defence age' should be 13 years of age.

We recognise that some young people can look older than they are, deliberately or otherwise, and we remain concerned that the onus of responsibility must remain with the accused to ascertain the age of the young person.

In light of this we propose that in addition to the no defence age of 13, where the young person is aged between 13-17 years, the accused must prove not just that they 'honestly' and 'reasonably' believed that the young person was of age, but that they took reasonable steps to confirm the young person's age.

It is our position that such reasonable steps should be clearly defined and include steps other than simply asking the young person their age. We know that some young people will deliberately misrepresent their age, or in matters where they believe they are in a relationship with the older person, will defend that older person by saying that they told them they were of age.

This may include sighting identification or the circumstances where they met (for example meeting a young person in a nightclub).

Question 6
Should the *Code* explicitly allow an accused person to combine the mistake as to age and consent defences (for a further explanation see 2.2.3)?

It is our position that consent defences can only be utilised where (a) the young person (victim) is 13 years or older and (b) the age discrepancy between the accused and the young person is no more than 10 years. It is our view that it should not be a defence for the accused to argue consent outside of these restrictions.

As discussed in the introduction to this submission, the issue of consent is underpinned by the innate power imbalances between young people and adults. The basis of this legislation, must be the protection of children and young people against sexual harm and exploitation.

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 procuration and communication offences relating to a young person under the age of 17?
(b) Should the onus be on the prosecution to prove that the defendant had no honest and reasonable belief that the young person was under 17 or should there be a legal burden on the defendant to prove such a mistake?

It is our position that the onus of proof in relation to the mistake to age defence should be consistent across all offences and that the burden of proof should be with the accused.

That is it is for the accused to raise this defence, and therefore the accused must satisfy an evidential burden, on the balance of probabilities. The prosecution must then bears the responsibility to establish beyond reasonable doubt that the belief was not held, or that it was not a reasonable belief to hold in the circumstances.

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*?

Bravehearts does not support the adoption of a "knew or ought to have known that the young person was under age" test in place of the defence of mistake.

As outlined in our response under Question 5, we accept that some young people look older than they are and as such we believe that the responsibility must remain with the accused to ascertain the age of the young person.

The 'knew or ought to have known' test is one that should be employed by the prosecution in response to the defence of mistake based on an honest and reasonable belief.

Question 9
(a) Should the defence of mistake as to age in s 125A(5) be repealed?
(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?
(c) Do you agree that the offence be renamed 'persistent sexual abuse of a child'?

It is our position that the defence of mistake as to age should be strengthened to include a 'no defence' age combined with a similarity of age defence, to limit the application of this defence to matters where the accused person is not more than ten years older the victim:

"It is a defence to a charge to prove that the accused person was under the honest and reasonable belief that the other person was of or above the age of 17 years, where:

(d) That person was of or above the age of 13 years; and

(e) The accused person was not more than ten years older than that person; and

(f) Where the other person is between the ages of 13 and 17 the accused person made reasonable steps to confirm the other person's age"

We agree that the definition of offences should be redefined to ensure that if sexual offences outside of Tasmania can be considered when dealing with an offence committed within the State.

We also support the redefinition of 'maintaining a sexual relationship', but would suggest that the offence be renamed 'persistent sexual harm or exploitation of a child'.

There is a shift in the language of sexual offences away from 'sexual abuse' as this term does not fully encompass the range of behaviours. The sector is moving towards a broader terminology that does not imply just physical contact. We would recommend that the legislation use this broader language and rename the offence as 'persistent sexual harm or exploitation of a child'.

Summary

While we recognised that it is outside the parameters of this current State-based Inquiry, it is our position that the discrepancies across jurisdictions continue to create difficulties for legislators and law enforcement. We believe that legislation needs to be consistent across States and Territories, it needs to include clear definitions and procedures for enforcement and it needs to make a stand against those who prey on children.

Broadly, in relation to the current Inquiry by the Tasmania Law Reform Institute, we recognise the complexity of these laws and commend the Institute for its work in this area. Please contact us (07 5552 3000 or research@bravehearts.org.au) if further information or clarification is required in relation to this submission.

Warm Regards

Hetty Johnston
Founder & Executive Director

Carol Ronken
Criminologist, BA (psych), MAppSoc (social research)
Research and Policy Manager