SUBMISSION TO THE
STANDING COMMITTEE ON
SOCIAL ISSUES

INQUIRY INTO
AN EQUAL AGE OF CONSENT

by the
Commission for Children and Young People
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1.0 INTRODUCTION

1.1 NSW Commission for Children and Young People

The Commission for Children and Young People (hereafter referred to as the Commission) was established by the 
Commission for Children and Young People Act 1998. The Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and well-being of children are the paramount considerations

(b) the views of children are to be given serious consideration and taken into account

(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children: s10.

The Commission is required to give priority to the interests and needs of vulnerable children: s12.

Children are defined in the Act as all people under the age of 18 years: s3. The terms “child” and “children” will generally be used in this submission to refer to those under the age of 18 years, and the terms “young person” and young people” will be used to refer to those over 12 years when necessary to distinguish this age group.

One of the principal functions of the Commission is to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children: s11(d).

1.2 The Commission’s response to the inquiry

The Commission is pleased to have the opportunity to make this submission to the Inquiry into an equal age of consent.

The Commission supports the changes proposed by the Crimes Amendment (Sexual Offences) Bill 2002. A number of issues which the Commission has considered in forming this view are discussed below.

2 Lack of evidence for unequal age of consent

The current age of consent law is not based on any evidence regarding the inability of young men under the age of 18 years to consent to sexual activity. It is also inconsistent with other laws which recognise that young men and women are capable of consenting to heterosexual sex, and young women to lesbian sex from the age of 16 years. Having reviewed the international literature, the Commission can find no evidence that:
• young men aged 16 and 17 years are less able to make decisions about homosexual sexual activity than heterosexual activity, nor that
• young men are less able to make decisions about sexual activity than young women.

There is no evidence that age of consent legislation influences young people when they make decisions about when to begin sexual activity. Most young people make their own decisions about when they are ‘ready’ to have sex, regardless of legislation. Furthermore, research shows that current age of consent legislation is out of step with the reality of most young gay men’s lives. Repeated studies show that the average age of first homosexual activity for young men is well below 18 years (Davies et al 1992: 259-272) and overwhelmingly involves consensual sex with a partner of the same or similar age. Given these circumstances, the current legislation criminalises a great deal of already-occurring sexual activity, and is thus likely only to make that activity more secretive and guilt ridden. (Maplestone and Roberts, 2001:37). This situation has adverse effects for the mental health and emotional wellbeing of young people.

3 Discriminatory nature of current legislation

The provisions in the Crimes Act 1900 are effectively a hangover from the discriminatory laws which criminalised all male homosexual activity and which were repealed in 1984. The current provisions continue the criminalisation of homosexual activity amongst young men aged 16 and 17 years old. As the provisions apply to male-to-male sex only, they are clearly discriminatory.

This current anomalous and discriminatory situation is far from the outcome publicly envisaged by the then Premier Neville Wran when he introduced the legislation that legalised homosexual sex in 1984. At the time, the disparity between male heterosexual and homosexual ages of consent was intended as a short-term compromise designed to ensure that the bill was passed in the face of conservative elements on both sides of the house (Maplestone and Roberts, 2001:25). Speaking about the 1984 bill, Wran publicly expressed his expectation that the disparity would later be rectified:

“The bill is not designed to cure all existing anomalies [specifically the unequal ages of consent] relating to homosexual practices contained in the Crimes Act. I would expect that such anomalies would in due course be the subject of a separate review of the Crimes Act as a whole” (Cited in Bolger 1998:54).

Given that 18 years have passed since that comment, it would seem that rectification of these anomalies is well overdue. An Act based on the discriminatory premise that homosexual sexual activity must be treated differently to heterosexual activity has no place in NSW law, and is not compatible with the range of other anti-discrimination measures that the NSW Government has established and demonstrated such commitment to.
4 Negative impact of current legislation on young gay men

The Commission is concerned that the current Act has a negative impact on young gay men. There is evidence to suggest that criminalisation of the sexual activity of gay men aged 16 and 17 years old:

- gives tacit support to homophobia. This potentially increases the various forms of bullying, violence and discrimination already faced by young gay men, particularly at school (Griffin 1995).
- has a negative impact on young gay men’s self esteem and emotional well being by increasing their feelings of isolation and marginalisation. This is of particular concern given the prevalence of suicide among young gay men (Kulkin et al 2000, Kendall and Walker 1998).
- makes it difficult for young men to access information and support regarding their sexuality and associated health issues because of the associated stigma.
- compromises the ability of workers in health, welfare and counselling services to provide information and support about sexuality and sexual health issues to young men. Workers have reported great difficulties in providing such services as this activity would potentially be in breach of the Crimes Act. Such workers could be seen to be aiding or promoting illegal behaviour, leaving them open to prosecution. Some services have been legally advised not to provide such services to young men under 18 years.
- impedes the ability of teachers in high schools to provide comprehensive information about human relationships and sexuality, including safer-sex messages (Maplestone and Roberts, 2001:55).

5 Protection of children from sexual assault

The protection of children from sexual assault is of the utmost importance. However, the current unequal age of consent law is not an effective or legitimate part of the range of legislative and other strategies employed by the NSW Government to prevent such crimes. Criminalisation of consenting young gay men does not protect non-consenting victims of sexual assault.

Both boys and girls can be subject to sexual assault and other sex offences. It is important that laws protect all children, and the gender neutral laws relating to sex offences and sex with children under 16 years already do that. Furthermore, a person making unwanted sexual advances on anyone can be charged with a criminal offence, and equalising the age of consent laws will not change this fact.

After extensive investigations into numerous instances of paedophile activity, the Royal Commission into the New South Wales Police Service considered
the present age of consent legislation (1997:1074-1082). In summary, the Commission regarded this section of the *Crimes Act 1900* as "on any view, discriminatory and anomalous in its application". The Royal Commission could find "no reason:

- to perpetuate a distinction between consensual homosexual and heterosexual activity; or
- to suppose that legislative change to achieve uniformity in this area would bring about any behavioural shift, or that it would, in real terms, expose any more children to the risk of paedophile activity than are presently exposed to that risk (that is, so long as the age of consent does not go below 16 years)".

Accordingly, the Royal Commission came to the view that the *Crimes Act 1900* should be the subject of further review in the light of community opinion, and in light of matters identified in the Commission’s report. The Commission suggested that this review consider:

> “a repeal of those sections which are directed specifically to male homosexual activity, and extension (where necessary) of the remaining provisions so as to make them also applicable to male homosexual activity – this would result in a common age of consent, a common defence of honest and reasonable mistake as to consent, and common maximum penalties” (1997:1082).

The *Model Criminal Code* endorsed by the Standing Committee of Attorneys General (1999) also paid particular attention to offences against children. While the Committee did not recommend the particular age at which the age of consent should be set, it did strongly recommend that:

> “the age of consent should be the same regardless of whether the activity is straight, male homosexual or lesbian” (1999:123).

The Committee could see no reason to make a distinction based on the gender of either the offender or the child victim, and went on to say:

> “All children should be protected equally, regardless of gender, just as all offenders against children should be punished severely, regardless of gender” (1999:123).

The Commission concurs strongly with this view.

### 6 Consistency with other jurisdictions

Most other Australian States and Territories have a uniform age of consent. In Victoria, Western Australia and the Australian Capital Territory the age of consent is 16 years, and in South Australia and Tasmania it is 17 years.\(^5\) These laws apply regardless of whether the sexual activity is heterosexual, lesbian or male homosexual.
Maplestone and Roberts (2001) considered the age of consent in 50 countries, and found only seven in which the age of consent for male to male sex was higher than the current provisions in NSW. The authors point out that nearly all OECD-type countries, all Western European democracies, and the majority of former communist states in Eastern Europe and the Balkans exhibit significantly more progressive age of consent legislation regarding male homosexual activity (Maplestone and Roberts, 2001:27-9)

As many other nations and most Australian jurisdictions have done, NSW should amend the Crimes Act 1900 to ensure that the law treats everyone equally, regardless of gender or sexuality.

7 CONCLUSION

The Commission for Children and Young People supports the lowering of the age of consent for homosexual male activity to the same age which applies to heterosexual and lesbian sexual activity, as proposed in the Crimes Amendment (Sexual Offences) Bill 2002.

Amending the Crimes Act 1900 in the manner proposed would remove the current element of discrimination from the Act. The amendments will bring the Crimes Act 1900 into line with the vast majority of NSW legislation which upholds the principle of anti-discrimination with regard to homosexual activity or sexuality. The change would establish a non-discriminatory and gender neutral age of consent, based on the principle that young homosexually active men have the same capacity to make decisions about their sexual lives as young heterosexually active men and women and lesbians. This principle is clearly and overwhelmingly supported by the available evidence, and has already been adopted by most Australian and a great many international jurisdictions.

The anomaly regarding homosexual age of consent was created some 18 years ago when male homosexual activity was legalised. Since that time there has been a reasonable expectation that the Crimes Act 1900 would be reviewed and this discriminatory hangover from the previous Act would be removed. These amendments will finally address that expectation.

These amendments will also ensure that the Act more accurately reflects the reality of young men’s sexual lives. The change is unlikely to have an effect on the numbers of young men engaging in sex at any particular age, but it will legitimise much already-occurring consensual sexual activity among 16 and 17 year old young men. This will go someway towards removing the stigma and guilt often associated with these activities, and perhaps reduce some of the homophobia directed towards young gay men as a result.

Decriminalising the homosexual activity of young 16 and 17 year old men will also make it easier for young gay men to access the support and services that they may need, and for workers in those services to provide assist them openly and without fear of breaching the law. This amendment is one way to
provide education, information and appropriate services to all young people to help them make safe and informed choices about a range of issues relating to sexuality, sexual activity and sexual health.

The amendments proposed would not undermine the NSW Government’s commitment to child protection. The amendments relate to consenting sexual activity only, and would not have any effect on laws relating to the range of offences involving non-consensual sexual activity. Laws criminalising these offences already exist, and apply regardless of the gender or sexuality of either the victim or the offender.

8 REFERENCES


Cass, Dr Vivienne (2001), ‘Age of consent for sexual activity: findings from the scientific literature to support equality of age of consent for same-sex and different-sex sexual behaviours’, paper prepared for Western Australian Committee on Gay and Lesbian Law Reform.


Maplestone P and R Roberts (2001) The age of consent and gay men in New South Wales, University of New South Wales.


9 ENDNOTES

1 This is supported by recent focus group research commissioned by the Gay and Lesbian Rights Lobby of NSW, and undertaken by the School of Social Work, University of New South Wales. Young men in this research reported that regardless of their knowledge of age of consent legislation, they would (and did) have sex when they considered themselves to be ready. See Maplestone P and R Roberts (2001:37).

2 This study found that 50% of the 1,000 young gay men in the cohort had engaged in homosexual sex by age 16, and 90% by age 18. The mean age of first homosexual experience was 15 years, the median slightly under 15 years. Similar findings were made by Dr Vivienne Cass (2001) who reviewed research from 19 studies of gay men (from 1971-1994) and 9 studies of bisexual men (1977-1995). Cass found that on average, young men’s first sexual experience with another male occurs during early to mid adolescence – at 14.8 years for gay men and at 16.4 years for bisexual men.

3 Of the Davies et al cohort, 98% reported that their first homosexual experience was consensual, and 92.6% reported that it was with a partner of the same age or slightly older.

4 For example, the AIDS Council of NSW was given legal advice not to supply instructions on condom use to young people at an under-18 dance party organised by Mogenic – a gay and lesbian youth organisation. For other examples, see Maplestone and Roberts (2001: 55).

5 Queensland legislation makes a distinction between types of sexual activity rather than gender of the participants. The age of consent in Queensland is 16 years for vaginal intercourse and 18 years for anal intercourse (either with a male or female person).