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The age of consent

by

Rachel Simpson and Honor Figgis

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NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

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EXECUTIVE SUMMARY

An age of consent is designed to protect young and innocent children from physical and psychological harm caused by engaging in sexual intercourse before he or she is 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. There is no objective means of determining at what age the age of consent should be set, since children mature and develop at different rates. The purpose and applicability of such an age of consent is discussed at Part 2.0 - *Why have an age of consent?*

The age of consent in Australia depends upon which state the person in question is in, whether the person is a male or female, and the nature of the sexual intercourse the person is engaged in. This can lead to a number of inconsistencies both between the states and between males and females. In addition, the Commonwealth *Crimes Act 1914* also includes child sexual abuse offences, that rely on an age of consent. These are discussed in Part 3.1. The provisions in the New South Wales *Crimes Act 1900* that rely on an age of consent are discussed in detail in Part 3.2. In Part 4 - *Comparative position overseas*, the age of consent in a number of overseas jurisdictions is included in tabular form to provide an indication of where Australia stands in relation to the ages of consent in the international context.

The debate surrounding the age of consent raises the broader point of the role of the criminal law. Some argue that the function of the criminal law is to preserve public order and decency, but not to intervene in the private lives of citizens or seek to enforce any particular form of behaviour. However, others argue that the criminal law has a responsibility to prevent harm to society stemming from the moral disintegration of society, and the law therefore can intervene in both the private and public lives of individuals to uphold the shared morality of society. This issue is addressed in Part 5.0 - *Philosophical/ethical issues*.

The age of consent laws can either remain as they are, or be amended so that they become gender-neutral. If this occurs, then there are two options: the age of consent for females can be raised to 18 years, or the age of consent for males can be lowered to 16 years. The latter option is the one most favoured by the Royal Commission, the Queensland parliamentary Criminal Justice Commission and the Model Criminal Code Committee. The primary argument for lowering the age of consent for males is based on a belief that the existing regime is discriminatory because it imposes a higher age of consent for boys engaging in homosexual sex. The primary argument for maintaining the current age of consent for males revolves around a concern to protect young men from psychological and/or physical harm. The arguments for and against a uniform age of consent of 16 years can be found in Parts 6.1 and 6.2.

1.0 INTRODUCTION

There have been renewed calls to introduce a gender-neutral age of consent in New South Wales following the release of the *Final Report* of the Royal Commission into the New South Wales Police Service in August 1997. The Royal Commission, while stating that it was the role of the community, not the Commission, to determine whether there should be any change in the age of consent, proceeded to state that it could see no reason to “perpetrate the distinction between consensual homosexual and heterosexual activity”.¹

In order for “the community” to make a decision about age of consent laws, it is helpful to understand the purpose of those laws, the current law and its effect in New South Wales and other Australian and overseas jurisdictions, the options for changing those laws and the arguments for and against introducing a uniform age of consent for males and females. It should be said at the outset that this is an area of the law which is intricately tied to questions of religion, morality, ethics and the role the criminal law plays in shaping those values.

2.0 WHY HAVE AN AGE OF CONSENT?

This part of the paper discusses the need for or desirability of an age of consent generally, regardless of whether the child is male or female, and regardless of whether the sexual intercourse is male-female or male-male.

A statutory age of consent to sexual intercourse for the purposes of the criminal law in the United Kingdom can be found as early as 1275. It was originally 12, was raised to 13 in 1875 and to 16 in 1885.² There is a widely held belief in the child as an innocent, whose innocence must necessarily be protected. A series of laws operate to that effect, of which the age of consent is one.³ Other examples are the common law presumption of innocence of a child under 10 years, and the laws relating to children’s evidence in criminal proceedings. As a part of this belief in the innocence of children, it is further believed that children, due to dependency and immaturity, and their lack of capacity for abstract rational thought, are not capable of giving informed consent to sexual activity in the same way as

¹ Royal Commission into the New South Wales Police Service, *Final Report Volume V: The Paedophile Inquiry*, August 1997, p. 1079.

² Working Party on the Age of Consent in relation to Sexual Offences, *Working Paper*, HMSO, June 1979, para 10.

³ When the age of consent laws was raised to 16, however, it had less to do with protecting the innocence of the child than with curtailing what was perceived as the immorality of males: ‘to limit male sexuality in the home and in the streets and brothels, to protect women and girls by imposing a single standard of conduct on both sexes - the standard previously followed by women’: B Faust, ‘Child sexuality and age of consent laws: the Netherlands model’, *Australasian Gay and Lesbian Law Journal* (1995) no 5, p. 79.

adults.⁴ By having age of consent laws, legislators are acknowledging their understanding that sexual activity can be both psychologically and physically harmful to children. It is the accepted view that children are necessarily exploited and abused in child/adult sexual relationships. While there is no argument that this is indeed the case in the majority of instances, there are those who argue that there are situations where this is not the case, and where, in fact, the children have experienced positive child/adult sexual relationships.⁵

There is no objective method for determining at what age a person can properly consent to sexual intercourse. In fact it was argued during the 1984 debate on the *Crimes (Amendment) Bill*⁶ that “age limits are not determined by any particular logic, but by what is acceptable to the majority at any one time...it can and ought to be varied as conditions change....” (D.P. Landa, MP).⁷ Even if some sort of objective standard could be developed, it would necessarily be a standard formulated for the ‘average’ or ‘normal’ child, and would not take into account individual differences in the rate and level of development and maturity. Following this argument to its logical conclusion, it presents a case for no universal age of consent for either females or males, with each case being examined in its individual merits. However plausible this argument might appear to some, there is an agreed need for certainty in this area, and a recognition that having a different age of consent for each person based on their level of maturity would be “unworkable in practice and would rapidly bring the law into disrepute”.⁸

‘Consent’ must mean fully informed consent. The *Butterworths Concise Legal Dictionary* defines consent in relation to the criminal law to be: ‘voluntary agreement freely given by a rational and sober person able to form a reasonable opinion upon the matter to which he or she consents’.⁹ The Royal Commission on Human Relationships recommended in 1977 that 15 be the general age of consent, basing this decision on the fact that:

... this approach would be a more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions. At this age children can leave school, get jobs and start playing a responsible role in

⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), *Discussion Paper, Chapter 5: Sexual Offences against the Person*, November 1996, p. 97. The MCCOC draws on a report by the Law Reform Commission of Victoria, Report 18, *Sexual offences Against Children* (1988).

⁵ T Leahy, ‘Sex and the age of consent: the ethical issues’, *Social Analysis*, No 39, April 1996, pp. 27-30.

⁶ This Bill, introduced as a Private Members Bill by the then Premier, Neville Wran, decriminalised homosexual intercourse between consenting adults.

⁷ NSWPD, 15/5/84, p. 702.

⁸ Working Party on the Age of Consent in relation to Sexual Offences, n 2, para 17.

⁹ P Nygh & P Butt (eds), *Butterworths Concise Australian Legal Dictionary*, Sydney, 1997, p. 82.

society.¹⁰

Regardless of the age that is adopted, there must be some consideration, as indicated above, of the nature of informed consent, and of the relationship between sexual development in children and development in other areas of responsibility. Sexual maturity does not just mean physical maturity, nor, in the opinion of the Working Party does it mean the fixation of a person's sexual pattern. Rather, it means that the child is capable of exercising his or her choice in giving informed consent to sexual intercourse, being fully aware of the full implications arising from the giving that consent.¹¹

Working from the understanding that there is justification for having an age of consent¹², there are a number of reasons given historically for why the age of consent has been lower for girls than for boys in a male-male sexual relationship. Primarily these are based on the earlier physical maturity of girls,¹³ and the “undesirability” of male-male sexual intercourse.¹⁴ The arguments for and against maintaining this distinction, rather than having gender-neutral laws are discussed at Parts 6.1 and 6.2, below.

3.0 AGE OF CONSENT IN AUSTRALIA

Under Australian law, the “age of consent” can refer to either:

1. the age from which a person may consent to marriage without parental approval (18 years in all Australian jurisdictions: *Marriage Act 1961* (Cth), section 11), or
2. the age from which a person may lawfully consent to having sexual intercourse (see chart below for comparative table).¹⁵

¹⁰ Royal Commission on Human Relationships *Final Report*, Volume 5, Canberra 1977, p. 210.

¹¹ Working Party on the Age of Consent in relation to Sexual Offences, n 2, para 22.

¹² This is not a universally held view: in 1979 the Working Party on the Age of Consent in Relation to Sexual Offences indicated that it would have preferred “a total abolition of the idea of an age of consent, since it felt that the concept was increasingly out of touch with present day realities”. It has also been suggested that the best way of protecting young people is to exclude the criminal law altogether from the field of consensual sexual relations, based on the claim that young people are very often deterred from seeking advice of help by the knowledge that they are “criminals”: Working Party, n 2, paras 3, 14-15.

¹³ In response to this argument, the point has been raised that “physically immature” boys are not prohibited by law from engaging in male-female intercourse, only male-male intercourse: Gay and Lesbian Rights Lobby, *The Equal Age of Consent Bill*, Sydney, 1995, p. 4.

¹⁴ MCCOC, n 4, p. 101. However, boys seek sexual knowledge earlier than girls. Further, it has been argued that boys begin sexual intercourse earlier than girls. It is argued, therefore, that uniform age of consent laws or age of consent laws that do not make allowance for some sort of consensual relationship will, therefore, discriminate against boys: Faust, n 3, p. 83.

¹⁵ Nygh, n 9, p. 16.

The age of consent in relation to marriage is not the focus of this paper. Therefore, all references to the “age of consent” refer to the age from which a person may consent to sexual intercourse. The age of consent is important legally because it is the age below which “statutory rape” is committed if sexual intercourse has occurred. If a person has sexual intercourse with a person below the age of consent, that person’s consent is irrelevant and an offence of sexual assault has been committed.

The age of consent in Australia depends on a number of factors:

- the state in which the person resides;
- whether the person is a male or female, and
- whether the sexual activity is male/female, male/male or female/female.

The table below outlines the different ages of consent in Australia¹⁶:

State	MALE-FEMALE SEX ♂♀ #	MALE-MALE SEX ♂♂	FEMALE- FEMALE SEX ♀♀
ACT	16	16	no laws
NSW	16	18	no laws [†]
NT	16	18	no laws
Queensland	16/18*	16/18*	16/18*
SA	16/17	16/17	16/17
Tasmania	17	17	17
Victoria	16	16	16
WA	16	21	16

This table was reproduced from the Australian part of a comparative table of worldwide ages of consent appearing on the Internet, prepared by an organisation called Pinkboard.¹⁷

Notes on the table

¹⁶ For a more complete comparison of child sex offences in each State or Territory, see Appendix P17 of the Royal Commission, n 1, Volume VI - Appendices, pp. PA 105-PA 121.

¹⁷ [Http://www.pinkboard.com.au/consent.html](http://www.pinkboard.com.au/consent.html). Pinkboard takes no responsibility for the accuracy of the information contained in their table. I have corroborated their information as far as possible, however, the fact that some inaccuracies may still exist can not be totally excluded.

[#]In the case of male-female sexual intercourse there is no age of consent for the male. The age indicated, therefore, only applies to the female party.

[‡] While there is no provision which expressly sets the age of consent for female-female sex, the general law relating to age of consent and sexual intercourse establishes the general age of consent in this instance as 16. Unlike male-male sexual intercourse, which specifies 18 as the age of consent in that circumstance, we can therefore assume that the age of consent for female-female sexual intercourse is 16.

* In Queensland, anal sexual acts are illegal until the age of 18 years. All other sexual acts are legal from 16 years, regardless of whether the parties are heterosexual or homosexual.

In South Australia, the age of consent is 17 years, however it is a defence to a charge of unlawful sexual intercourse if the person with whom the accused is said to have sexual intercourse is between 16 years and 17 years and the accused was either under the age of 17 years or believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse is above 17 years.

As the table illustrates, there is a marked difference between the states. There is also a marked difference between the age of consent for male-female sexual intercourse and male-male intercourse in New South Wales, the Northern Territory and Western Australia. All other states maintain the same age of consent for both male-female and male-male intercourse.

3.1 Commonwealth *Crimes Act 1914*

The Commonwealth *Crimes Act 1914* includes provisions which make it an offence for Australian citizens to engage in certain sexual activities in relation to children while overseas. These offences are contained in Part IIIA - Child Sex Tourism, and include:

- Section 50BA - Sexual intercourse with a child under 16
- Section 50BB - Inducing a child under 16 to engage in sexual intercourse
- Section 50BC - Sexual conduct involving a child under 16
- Section 50BD - Inducing a child under 16 to be involved in sexual conduct
- Section 50DA - Benefiting from foregoing offences
- Section 50DB - Encouraging foregoing offences

It is interesting to note that the Commonwealth *Crimes Act 1914* does not distinguish between male-female and male-male sexual intercourse. The definition of sexual intercourse does not differentiate between male-female and male-male intercourse, and there is no specific section or definition of homosexual sexual intercourse as there is in the New South Wales legislation (see Part 3.1 below). From this it can be assumed that sexual intercourse with a male over 16 years is not a crime for the purposes of the Commonwealth Act, which means that for the purposes of this Act, a male over 16 years is able to consent to sexual intercourse with another male.

3.2 New South Wales legislation in detail

The *Crimes Act 1900* (NSW) contains sexual assault and abuse offences to which the age of the child is relevant. A summary of these offences follows:¹⁸

Offence	Section
Sexual intercourse* without consent and with knowledge of the absence of consent	61I
Sexual intercourse without consent accompanied by actual or threatened violence, or in the company of another person, or where the victim is under 16 years of age or has a serious physical or intellectual disability	61J
Assault with intent to have sexual intercourse	61K
Indecent assault	61L
Indecent assault in company of another person or if the victim is under 16 years of age or if the victim is under the authority of the offender or if the victim has a serious physical or intellectual disability	61M
Act of indecency (or incitement) – if the victim is aged under 16 years	61N(2) 61N(1)
Act of indecency (or incitement) in the company of another person or where the victim is under the authority of the offender or where the victim has a serious physical or intellectual disability – if the victim is aged under 16 years – if the victim is aged under 10 years	61O(1A) 61O(1) 61O(2)
Sexual intercourse with a person under 10 years attempt or assault with intent	66A 66B
Sexual intercourse with a person of or above age 10 an under 16 years – if the child is also under the authority of the offender – attempt or assault with intent	66C(1) 66C(2) 66D
Carnal knowledge‡ by a schoolmaster or either teacher, or father or step-father of a girl aged of or above 16 years and under 17 years being his pupil, daughter or step-daughter – attempt or assault with intent	73 74

¹⁸ This table is based on a similar table in the final report of the Royal Commission n 1, pp. 1965-1067.

Incest Carnal knowledge by a male or female aged of or above the age of 16 years who is his sister, daughter, granddaughter, or female who permits same – attempt	78A 78B
Homosexual intercourse[#] by a male person – with a male under 10 years – attempt or assault with intent with a male under 10 years – with a male of or above the age of 10 years and under 18 years – attempt or assault with intent with a male of or above the age of 10 years and under 18 years	78H 78I 78K 78L
Homosexual intercourse by a male person being a schoolmaster or other teacher, or father or stepfather with a male of or above 10 years and under 18 years, being his pupil, son or stepson – attempt	78N 78O
Act of gross indecency by a male towards a male under 18 years of age	78Q(1)
Soliciting, procuring or inciting or advising any male person under 18 years to be party to an act of gross indecency towards a male	78Q(2)

* *Sexual intercourse* is defined in section 61H of the *Crimes Act 1900* to be:

- a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
 - (i) any part of the body of another person; or
 - (ii) any object manipulated by another person

except where the penetration is carried out for proper medical purposes; or
- b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person; or
- c) cunnilingus; or
- d) the continuation of sexual intercourse as defined in paragraphs (1), (b) or (c).

‡ *Carnal knowledge* is defined in section 62(2) of the *Crimes Act 1900* to be:

sexual connection occasioned by the penetration of the anus of a female by the penis of any person, or the continuation of that sexual connection.

Homosexual sexual intercourse is defined in section 78G of the *Crimes Act 1900* to be:

- a) sexual connection occasioned by the penetration of the anus of any male person by the penis of any other person;
- b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another male person; or
- c) the continuation of homosexual intercourse as defined in paragraph (a) or (b).

A number of inconsistencies arise from these provisions. The most obvious is the age of consent for male-female sexual intercourse and male-male sexual intercourse, as indicated in Part 3.0 above. This has a number of effects:¹⁹

1. A male who has anal or oral sexual intercourse with a female aged 16 or 17 years commits no offence, but if the same male has anal or oral sexual intercourse with a male aged 16 or 17 years he commits an offence. A female who has anal or oral sexual intercourse with a male aged 16 or 17 years commits no offence.
2. If a male teacher, father or stepfather engages in oral or anal sexual intercourse with a male aged 17 years, being his pupil, son or stepson, he commits an offence, yet if the same person has anal or oral sex with his female pupil, daughter or stepdaughter aged 17 years, he commits no offence.
3. A female schoolmistress, mother or stepdaughter who engages in sexual intercourse with her male pupil, son or stepson aged 16 years or over does not commit an offence.
4. If a male commits an act of gross indecency towards another male aged between 16 and 18 years, or solicits, procures, incites or advises such a male to commit an act of homosexual intercourse or an act of gross indecency towards another male he commits an offence, yet no equivalent offence applies in relation to comparable conduct towards a female, or by a female towards another female.
5. A defence arises where a male has sexual intercourse with a female aged between 14 years and 16 years and the girl consents if he has reasonable grounds to believe, and did believe, that the girl was aged 16 years or over. The same defence is available where the male attempts to have sexual intercourse with a girl aged between 14 and 16 years, or assaults the girl with such intent, or commits an act of indecency or aggravated indecency, indecent assault or aggravated indecent assault.²⁰ A similar defence is available to a woman where the victim is either a male

¹⁹ Ibid, pp. 1068-1071.

²⁰ *Crimes Act 1900* (NSW), sections 77(2).

or a female, but is not available to a male offender where the victim is also a male.²¹

These anomalies, based on the age of consent, could be said on one interpretation to have the effect of protecting those who sexually assault girls, comparative to those who sexually assault boys.

4.0 COMPARATIVE POSITION OVERSEAS

There is no more consistency in other jurisdictions regarding the age of consent than there is in Australia. The United States, in particular, has a very wide range of ages for both females and males engaged in either male-female or male-male sexual intercourse depending on the particular State's criminal law. The table below illustrates these differences, using a few examples from around the world. Where two ages are given, consent is permitted at the lower age in most circumstances, the higher age applying to a person in a position of authority over the younger, or where the lower age is permitted unless the younger person complains.²²

COUNTRY	MALE-FEMALE SEX ♂♀	MALE-MALE SEX ♂♂	FEMALE-FEMALE SEX ♀♀
Austria	14	18	14
Belgium	16/18	16/18	16/18
Brazil	18	18	18
Canada	14/18	18	14/18
Canada - <i>Quebec</i>	16	16	16
Colombia	14	14	14
France	15/18	15/18	15/18
Hungary	14	18	18
India	21	Illegal	Illegal
Israel	18	18	18

²¹ *Crimes Act 1900* (NSW), section 78R.

²² This table was compiled using information from a number of sources, including Pinkboard (see n 17), Outrage (<http://www.outrage.cynet.co.uk/consent.htm>) and the NSW Royal Commission (see n 1). It must be noted that many of these ages of consent have not been able to be confirmed from original sources. Where inconsistencies arose, the age included by the Royal Commission, if applicable, was taken to be correct. As illustrated by the more detailed examination of the New South Wales law (Part 3.2), the 'age of consent' may also be affected by the type and circumstance of the sexual activity in question.

Mexico	21	21	21
Netherlands ²³	12/16	12/16	12/16
New Zealand ²⁴	12/16	12/16	12/16
Romania ²⁵	14	Illegal	Illegal
South Africa	17	18	18
Spain	15	15	15
Switzerland	16	16	16
Turkey	18	18	18

²³ **The Netherlands** operates a two-tiered system in relation to the age of consent, effectively having the youngest age of consent in Europe. In 1970 the prohibition against male-male sexual intercourse between an adult and a minor between the ages of 21 and 16 years was removed, making the age of consent for both males and females 16 years. However, the possibility of consent exists for children aged between 12 and 16 years. In 1990, the Morality Laws were revised to the effect that all “non-violent” sexual intercourse with a child between 12 and 16 years will only be prosecuted upon complaint by the child, although the age of consent remains 16 years for both males and females. There is an exception where the perpetrator is in a position of authority over the child, which would include teachers, parents etc. Additionally, parents may complain on behalf of their child, as may the Child Protection Authority in cases where a child may have difficulty in complaining against their family member: Faust, n 3, p. 84.

²⁴ In **New Zealand**, a person under the age of 12 years can not legally consent to sexual intercourse, regardless of gender and regardless of the circumstances of the sexual activity. In limited circumstances it is not an offence to engage in sexual intercourse with a boy or girl aged between 12 and 16 years. In the case of male-female intercourse a defence exist if: (1) the male is younger than the girl, and the girl consents and that consent is not obtained on false grounds by a misunderstanding of the nature of the sexual act, or (2) the male is under 21 and believed that the girl consenting was 16 years or over and that was a reasonable one. In the case of male-male intercourse a defence exists if: (1) the other male is younger than the boy, and the boy consents and that consent is not obtained on false grounds by a misunderstanding of the nature of the sexual act, or (2) the other male is under 21 and believed that the boy consenting was 16 years or over and that belief was a reasonable one. The provisions also apply to anal intercourse, regardless of whether it is with a boy or a girl.

²⁵ In 1996, the **Romanian** Parliament voted to decriminalise male-male and female-female sexual intercourse, provided that it does not cause a “public scandal”. What constitutes a “public scandal” is not clear. The Romanian Government has said that any act to which two or more members of the public object could constitute a “public scandal” and ne grounds for prosecution: Outrage! London, ‘We want an age of consent of 14’, <http://www.outrage.cygnnet.co.uk/consent.htm>, p. 4 of 5.

United Kingdom ²⁶	16	18	16
United States <i>Alaska</i>	16	16	16
United States <i>Arizona</i>	18	Illegal	Illegal
United States <i>California</i>	18	18	18
United States <i>Colorado</i>	15	15	15
United States <i>Indiana</i>	16	18	18
United States <i>New Hampshire</i>	18	18	18
United States <i>New York</i>	17	18	18
United States <i>Oregon</i>	18	18	18

5.0 PHILOSOPHICAL/ETHICAL ISSUES

The age of consent is an issue that raises the broader question of the role and function of the criminal law. The issues were clearly identified in a report by the Wolfenden Committee in its 1959 *Report on Homosexual Offences and Prostitution*:

In this field, its [the criminal law's] function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It is not, in our view, the function of the law to intervene in the private lives

²⁶ The age of consent in the **United Kingdom** is the same as in New South Wales: 16 for females engaged in male-female sexual intercourse and 18 for males engaged in male-male sexual intercourse. Until 1994, the age for males was 21, a level set in 1967. It has been predicted that the newly-elected Labour Government will introduce amendments bringing the age of consent for males into line with that for females: 'Short Predicts Equal Age of Consent for Gays', BBC Politics 97, <http://www2.bbc.co.uk/politics97/news/05/0508/short.shtml>. Clare Short is the Secretary of State for International Development.

of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined. It follows that we do not believe it to be a function of the law to attempt to cover all the fields of sexual behaviour. Certain forms of sexual behaviour are regarded as sinful, morally wrong, or objectionable for reasons of conscience, or of religious or cultural traditional and such actions may be reprobated on these grounds. But the criminal law does not cover all such actions at the present time; for instance adultery and fornication are not offences for which a person can be punished by the criminal law....

We appreciate that opinions will differ as to what is offensive, injurious or inimical to the common good, and also as to what constitutes exploitation or corruption; and that these opinions will be based on moral, social or cultural standards....

We do not think it proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of that public good.²⁷

This view is the same as that contained in the report from Queensland's Fitzgerald Inquiry, although Commissioner Fitzgerald takes a more pragmatic approach. This is, perhaps, reflective of the different times in which the two reports were written:

Laws should reflect social need, not moral repugnance. Unless there are pressing reasons to do so, it is futile to try and stop activities which are certain to continue and upon which the community is divided. To do so takes resources away from the policing of other activities which the community considers undoubtedly more wrong, such as violence and fraud.

Where the moral issue is one upon which there is room for serious divergent opinions, the legislature should interfere only to the extent necessary to protect the community, or any individuals with special needs. Generally, those who take part voluntarily in activities some consider morally repugnant should not be the concern of the legislature, unless they are so young or defenceless that their involvement is not truly voluntary.²⁸

Another approach focuses on harm to society resulting from moral disintegration rather than harm (or the threat of harm) to individuals. "Harm" in this sense includes damage to the general social and cultural environment. A particular proponent of this "conservative approach" is Lord Devlin. In his work, *The Enforcement of Morals*, Lord Devlin argues that

²⁷ Working Party on the Age of Consent in Relation to Sexual Offences, n 2, p. 2.

²⁸ Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report*, July 1989, p. 186.

since a society rests on moral consensus, what threatens moral consensus threatens society. Without this shared morality, there can be no society, but only aggregates of individuals. According to this understanding, immoral conduct, even if it is no menace to others, may threaten one of the great moral principles upon which society is based. The law, therefore, can intervene in both the public and private spheres of conduct for the purpose of upholding the shared morality and protecting society. Lord Devlin pointed out that the criminal law is itself based on moral principles and that “In a number of crimes its function is simply to enforce a moral principle and nothing else”. Euthanasia and incest are examples of those acts he cited as which can be “done in private without offence to others and need not involve the corruption or exploitation of others” but which nevertheless were counted among criminal offences.²⁹ Lord Devlin relied on a version of the reasonable man test to determine what constitutes morality and the related question of how the moral judgments of society are to be ascertained. Immorality, for the purposes of the law, “is what every right minded person is presumed to consider immoral”.³⁰

6.0 REFORM OF AGE OF CONSENT LAWS

There are three broad possibilities regarding reform of age of consent laws:

1. Retain different ages of consent for male-female and male-male sexual intercourse
2. Lower age of consent for male-male sexual intercourse
3. Raise age of consent for male-female sexual intercourse

A fourth option is to have two ages of consent: one where the parties are the same or similar age, and another where there is a large age difference or where one party is in a position of trust or authority over the other party. This takes into account the nature of a child’s development and sexual experimentation and also recognises the fact that the harm done to children engaged in sexual intercourse is likely to be much greater if the sexual activity is with a person who is in a position of authority over the child, or who is significantly older than the child. Belgium, France, the Netherlands, New Zealand and Canada are examples of countries who have adopted this approach.

6.1 Arguments for a uniform age of consent of 16 years

The NSW Royal Commission stated that “the question whether there should be any change in the age of consent is uniquely a matter for the community to decide, rather than for this Commission to determine”, however, the Commission was able to see no reason why a distinction between the age of consent for heterosexual and homosexual activity should be maintained.³¹ This opinion is consistent with that of the Queensland Parliamentary Criminal

²⁹ P. Devlin, *The Enforcement of Morals*, Oxford, 1965, pp. 16-18. The essay on ‘morals and the criminal law’ was first published in 1959 under the title ‘The enforcement of morals’.

³⁰ Ibid.

³¹ Royal Commission, n 1, p. 1079.

Justice Committee³² and the MCCOC³³. The Royal Commission summarised the arguments for changing the law to a common age of consent of 16 years.³⁴ The arguments include:

- The existing legislation is discriminatory, out of line with legislation in other communities of a similar make-up to NSW, including other Australian States and Territories, and lacks any rational basis. The legislation is discriminatory because it imposes a higher age of consent for boys engaging in homosexual sex (18 years) than on girls and boys engaging in heterosexual sex (16 years for both).³⁵
- The Crimes (Amendment) Bill 1984, which led to the legalisation of homosexual activity between consenting adults, was the fourth major attempt to bring about that reform since November 1981. As such it was put forward as a ‘rather conservative’ reform, with the clear expectation that it would be reviewed at a later time, in the light of contemporary community standards.
- It is unrealistic to expect that, by reason of legislation, adolescents will defer sexual activity until some arbitrary age of consent, and similarly unrealistic to ignore the circumstance that very many, if not most adolescents, in contemporary society, are sexually active by the age of 16 years, whether they are male or female.
- Sexual identity and preference is determined early, and is not determined by youthful encounters.
- Homosexuality *per se* is no longer regarded as unlawful or as a deviance, or psychological disorder which should be treated or modified; rather it is recognised as an acceptable and natural choice of sexuality practised by a section of humankind since time immemorial. The drafters of the Model Criminal Code stated that ‘the inference that might be drawn from an older age of consent for homosexual conduct is that homosexuality is an undesirable activity from which males should be both protected and deterred until adulthood. It is questionable whether this is an appropriate aim of the criminal law’.³⁶

³² Queensland Parliamentary Criminal Justice Committee, *Report into the Report of the Criminal Justice Commission entitled “Reforms in Laws Relating to Homosexuality - An Information Paper”*, Report No 2, October 1990, recommendation 7, p. 49.

³³ MCCOC, n 4, p. 103.

³⁴ Royal Commission, n 1, pp 1076-1078.

³⁵ Discrimination on the ground of homosexuality is prohibited by the *Anti-Discrimination Act 1977* (NSW) Part 4C in the areas of employment, partnerships, trade unions, qualifying bodies, employment agencies, education, provision of goods and services, accommodation and registered clubs. It is also possible that Article 26 of the United Nations *Convention on Civil and Political Rights* may be relevant to the debate on discrimination in the age of consent. Article 26 prohibits discrimination on a number of grounds, including sexual status.

³⁶ MCCOC, n 2, pp. 101-2.

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- A discriminatory age of consent is inconsistent with the underlying principles and philosophy of anti-discrimination legislation in NSW, and reform of the law to bring about a uniform age of consent of 16 years for both heterosexual and homosexual activity has had the support of the Anti-Discrimination Board since at least 1982.
 - A discriminatory age of consent has potentially adverse effects on public health and education policies, by driving underground those who should be receiving advice on safe sex, permitted to obtain condoms, or provided with relevant health and education services.
 - Two provisions of the *Crimes Act 1900*, namely:
 - section 78Q(2) which makes it an offence for someone who knows or believes that another person has committed a serious offence, and has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to fail to bring the information to the attention of a member of the Police Service or other appropriate authority; and
 - section 316(1) which makes it an offence for someone who knows or believes that another person has committed a serious offence, and has information which might be of material assistance in securing the apprehension, prosecution or conviction of the offender, to fail to bring the information to the attention of a member of the Police Service or other appropriate authority;

are said to cause particular difficulty for HIV counsellors, education, doctors, social workers and others who should be able to provide advice on safe sex practices, HIV testing, medical care, counselling and the like to persons aged 18 years and under, without the risk of prosecution.

- The preservation of a criminal constraint upon a form of activity by adolescent males which is not uncommon, lends itself to extortion and corrupt practices on the part of police.
- The preservation of the existing laws risks stigmatising sexually active adolescent male homosexuals, making it more difficult for them to come to terms with their sexuality, increasing the incidence of depression, emotional disturbance and suicide, and inappropriately bringing them into contact with the criminal law when their female or heterosexual counterparts are free of such risks.
- The appearance of discriminatory treatment risks reinforcing homophobic bias and creating a false stereotype that homosexual males are likely to behave in a predatory fashion towards adolescents, and/or that males who have homosexual relations with boys aged between 16 and 18 years fall within the clinical definition of paedophile.

- Lowering the age of consent might encourage some younger homosexual men to remain at home rather than to leave, because of the present difficulty in being honest with their families, who see them as being involved in criminal conduct.
- The existing law tends to legitimise the sexual harassment and assault within schools of older gay pupils, leading some to take their lives, and others to opt out of further schooling.

Other arguments relating to lowering the age of consent for male homosexual activity focus on the notion that a statutory age of consent is arbitrary and inappropriate and should be replaced by more general tests turning, for example, upon whether the relationship was exploitative and abusive, or upon whether the child was sufficiently mature, physically and emotionally, to engage in a mutually satisfying relationship and consented to it.³⁷

6.2 Arguments against a uniform age of consent of 16 years

Arguments against changing the law of consent to a uniform age of 16 years generally revolve around protecting young men from psychological or physical harm. Some are based on the principle that current community standards dictate that heterosexual relationships are inherently healthier and more desirable than homosexual relationships. The Royal Commission into the New South Wales Police Service listed some of the arguments against a common age of consent of 16 years, including:³⁸

- Physical and emotional development was said to occur about two years later in boys than girls, so that extra time should be allowed for boys to determine their sexual identity and preference. In the United Kingdom, this argument was used to justify an age of consent of 21 years for male homosexual activity by the Wolfenden Report on Homosexual Offences and Prostitution:

While there are some grounds for fixing the age as low as sixteen, it is obvious that however 'mature' a boy of that age may be as regards physical development or psycho-sexual make-up, and whatever analogies may be drawn from the law relating to offences against young girls, a boy is incapable, at the age of sixteen, of forming a mature judgment about actions of a kind which might have the effect of setting him apart from the rest of society.... [M]ost of us would prefer to see the age fixed at twenty-one, not because we think that to fix the age at eighteen would result in any greater readiness on the part of young men between eighteen and twenty-one to lend themselves to homosexual practices than exists at present, but because to fix it at eighteen would lay them open to attentions and pressures of an undesirable kind from which the adoption of the later age would help to protect them, and from which they ought, in view of their special

³⁷ Royal Commission, n 1, p 1078; see also Leahy, n 2.

³⁸ Royal Commission, n 1, pp 1078-1079.

vulnerability, to be protected.’³⁹

The age at which an adolescent male’s sexual orientation is firmly fixed has not been conclusively determined, and while for many it may be below 16, there may be a significant number of youths between 16 and 18 years who are uncertain about their sexuality. The United Kingdom Policy Advisory Committee on Sexual Offences in its Working Paper of the Age of Consent in relation to Sexual Offences⁴⁰ stated that it is of the utmost importance to decide if possible the age by which a young man’s sexual orientation usually becomes fixed, because of the risk that a homosexual seduction before that age might turn him towards homosexual behaviour and prevent him from developing as a heterosexual. The Committee concluded:

The majority of us, however, take note of the fact that the medical evidence is by no means unanimous and are not convinced that there does not exist a vulnerable minority of young men aged 16-18 who may be in need of protection. In addition, the majority considered that another advantage of selecting 18 as the minimum age is that it gives to the overwhelming number of boys and young men a longer opportunity to settle down into a heterosexual pattern, and lessens the risk of pressures being brought on them while they are under the age of majority.

The Committee further considered that: ‘a homosexual relationship may be disturbing to an immature boy, even though his basic sexual pattern has been established as heterosexual. The likelihood of disturbance increases with the pressure put upon him to consent to homosexual relationships... some boys may be confused about their sexuality and a boy who is so confused is particularly open to exploitation.... The fact that the boy consents to homosexual advances does not mean that he is unlikely to be harmed.’⁴¹

- Amendment of the law would be seen as an encouragement of paedophiles, and would mark the beginning of a progressive relaxation or erosion of child sexual abuse laws.
- Lowering the age of consent would increase the opportunities for paedophile networks to expand.

Other arguments against a uniform age of consent of 16 years include:

- A lower age of consent may be seen as an endorsement of promiscuous sexual behaviour by adolescent boys.

³⁹ Report of the Committee on Homosexual Offences and Prostitution (HMSO, 1957, Cmnd 247 para 71.

⁴⁰ Working Part on the Age of Consent in relation to Sexual Offences, n 2, para 51.

⁴¹ Ibid para 54.

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- The ban on homosexual activities with males under 18 years may protect a vulnerable and perhaps impulsive group of adolescents from diseases associated with homosexual activities, such as HIV/AIDS. The New South Wales Council of Churches has stated that statistic released in 1997 indicate that juveniles indulging in pre-marital sex in the main do not use contraception, with an associated increased risk of sexually contracted diseases.⁴²
 - Lowering the age of consent may encourage male homosexual prostitution by youths who are motivated by financial considerations to engage in homosexual acts.
 - The discrepancy between the male and female ages of consent could be resolved by raising the age of consent for females to 18 years old. This would address the issue of discrimination on the basis of homosexuality in the age of consent laws.⁴³
 - If the age of consent for males is lowered to 16 years, then a defence of ‘restricted consent’ similar to that applying to girls between 14 and 16 could be introduced in relation to 16 year old boys. ‘Restricted consent’ is a defence to some charges of heterosexual sex with a child under the age of 16. Section 77 of the *Crimes Act 1900* (NSW) provides that it is a defence to a charge of sexual intercourse with a child under 16 under s 66C if the person charged and the child to whom the charge relates are not both male and if the child was over 14 years, the child consented to the offence and the person charged had, at the time of the offence, reasonable cause to believe, and did in fact believe, that the child to whom the charge relates was of or above the age of 16 years.

There is currently no similar ‘restricted consent’ provision for male to male sexual intercourse with a boy under 18 years. Concerns have been raised that if the age of consent was lowered for boys, and made uniform with the consent provisions for girls, men could legally have sex with boys as young as 14 in some circumstances. Some men might seek out opportunities to have sex with boys of 14 or 15, knowing of the availability of the defence.⁴⁴

- An age of consent of 16 for males to engage in homosexual sex would encourage moves to have the age of consent lowered even further, or abolished.⁴⁵

7.0 CONCLUSIONS

The question of at what age the age of consent should be set is, essentially, a personal one. It is a question that is difficult, if not impossible, to divorce from questions of religion,

⁴² Quoted by Rev the Hon F Nile, MLC, *NSWPD*, 17/9/1997 pp 72-73.

⁴³ Rev the Hon F Nile MLC, *NSWPD* 11/9/96 p. 4030.

⁴⁴ Rev the Hon F Nile MLC, n 18, p. 72.

⁴⁵ *Ibid.*

morals and ethics. The need to protect children from exploitation forms the rationale for retaining age of consent laws. Even if this rationale is accepted, there is no objective way to determine at what age a child no longer needs the protection of those laws. Whether the age of consent is raised or lowered, it is not certain that it will have any real impact on the incidence of sexual exploitation of young males or females.

Age of consent laws have been described by the Royal Commission as “discriminatory and anomalous in application”. The view has been expressed by others that any inconsistency is necessary in order to protect young men from psychological and/or physical harm. The question that remains to be answered, therefore, is whether these laws protect a group of the community from actions which are “so contrary to the common good” that they are justified in light of that perceived discrimination and anomalous application.