NSW PARLIAMENTARY LIBRARY RESEARCH SERVICE

The age of consent: an update

by

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Introduction: In October 1997 the Research Service published Briefing Paper No 21/97, *The Age of Consent*. The age of consent refers to the age below which a young person is deemed incapable of giving informed consent to sexual intercourse - the age below which consent is irrelevant to sexual offences against children. The paper discussed the rationale for an age of consent, the operation of the age of consent in Australia and particularly NSW and looked comparatively at the age of consent overseas. The paper examined options for reform of age of consent laws and arguments for and against a uniform age of consent of 16 years. At the time the original paper was published the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (the Committee) had released a discussion paper on Chapter Five of the Model Criminal Code - sexual offences against the person. In May 1999 the Report on Chapter Five was published. The purpose of this update is to examine the recommendations contained in that Report and how they might apply to NSW. Since the Briefing Paper was published, a number of amendments have been introduced into the United Kingdom Parliament to lower the homosexual age of consent in that country from 18 to 16. This update also examines the content and progress of those proposals.

Model Criminal Code: The Report on Chapter 5 of the Model Criminal Code (the MCC), 'sexual offences against the person', was released in May 1999. Division 3 concentrates on sexual acts committed against or with children. In the view of the Model Criminal Code Officers Committee (the Committee), the age of consent 'effectively amounts to a determination about when young people should be allowed to exercise autonomy and freedom of choice in sexual relationships'.[1] The report discussed the rationale for the inclusion of separate offences against children: that children, due to their dependency and immaturity, cannot give consent to sexual activity in the same way as adults, and that sexual activity can be both psychologically and physically very harmful to children.[2] A primary aim of the model Criminal code is to provide a simple scheme of offences which is able to be readily understood, administered and enforced. In light of this, and noting that Australian jurisdictions 'currently have widely divergent ages of consent', the committee made two recommendations:

- that the age of consent for both females and males, and for straight, male homosexual and lesbian sexual contact, be uniform *within* each jurisdiction, and

- that the age of consent be uniform *between* all Australian jurisdictions.[3]

The discussion paper had proposed a uniform minimum age of consent of sixteen. It based its proposal on the fact that 16 is the age of consent (for heterosexual sexual intercourse) in many jurisdictions, indicating that 16 might be generally acceptable as the age at which young people are mature enough to consent to sexual relations. Further, it was the Committee's view that an

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1 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Chapter 5, Sexual Offences Against the Person, *Report*, May 1999, p. 123.

2 Ibid, p. 117.

3 Ibid.

older age of consent (17 or 18) might be seen as overprotective.[4] On reflection, however, the Committee decided *not to* recommend a precise age at which the age of consent should be set within the Model Criminal Code, primarily due to the intense level of debate within the community and the profoundly moral nature of the issue of age of consent, in which the Committee claimed no expertise.

Similarly, the Committee decided not to recommend a specific age for a 'no defence age'. This is the age below which no defence whatsoever will be available with regard to a sexual offence. The Committee recommended three limited defences to sexual offences against children: a defence based on marriage, mistake about the child's age, and a defence based on similarity of age. Currently, NSW does not have a defence related to marriage.[5] Nor is there a defence based on similarity of age.[6] There is a limited defence based on mistake about the child's age where the child is over 14 years of age, consented to the commission of the offence and where the accused had reasonably believed that the child was of or above the age of 16 years (section 77(2)).

The Committee recommended separate offences featuring a higher age of consent for sexual contact between young persons and persons in specified intimate relationships with them. This recommendation follows a similar recommendation in the Final Report of the NSW Police Royal Commission in 1997. The rationale for the inclusion of such offences is that in certain relationships the potential for an imbalance of power is so significant that they justify a higher age of consent. The offence would be limited to school teachers, step parents, foster parents, adoptive parents, legal guardians, legal custodians, religious instructors, health professionals (including psychiatrists), counsellors, police and correctional officers.[7] The class of victims would be limited to those who are, at the time of the offence, in a direct relationship of care, supervision or authority with the accused. The Royal Commission recommended an age of consent of 18 in these situations. Although the Committee did not recommend any particular age of consent for this category of offence, in keeping with its decision regarding the general age of consent, the Committee recommended that the age of offence for persons in specified intimate relationships be two years higher than the general age of consent. NSW law is currently inconsistent in its

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4 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Chapter 5, Sexual Offences Against the Person, *Discussion Paper*, November 1996, p. 101.

5 It is a defence in Victoria if the accused had reasonable grounds to believe he or she was married to the child. In Western Australia it is a defence to a charge of sexual penetration of a child aged between 13 and 16 if the accused can prove that he or she was lawfully married to the child. South Australia provides that the offence of sexual intercourse with a person under the age of 12 does not apply to sexual intercourse between persons who are married to each other. Northern Territory law defines 'unlawful' sexual intercourse as between parties who are not husband and wife: see MCC, n 1, pp. 143-145.

6 In Victoria and the ACT, where the child is between 10 and 16, it is a defence that the accused person is not more than two years older than the child. In South Australia it is a defence to a charge of sexual intercourse with a person aged 16 that the accused is under 17 (ie allowing a one-year age difference). In Tasmania, where the child is 15 or over, it is defence that the accused is not more than five years older. Where the child is aged 12 to 14, it is a defence where the accused is not more than three years older than the child: see MCC, n 1, p. 149.

7 MCC, n 1, p. 167.

treatment of persons in authority. For example, while there is no separate offence for sexual intercourse with a child (female) between 10 and 16 years, there is an increased penalty from 8 years to 10 years where the accused is in a position of authority. However, there are separate offences of homosexual intercourse or attempted homosexual intercourse by a teacher and father or step-father, which carry maximum penalties of 14 and 7 years respectively, compared with maximum penalties of 10 and 5 years respectively for the general offences.

United Kingdom: There has been a lengthy campaign for equal age of consent laws in the United Kingdom. In 1994 the age of consent for homosexual intercourse was reduced from 21 to 18. A proposal to equalise the age of consent at 16 was defeated 307 votes to 280. Following a European Court of Human Rights ruling in 1997 that the two-tiered system of age of consent laws discriminates against homosexuals,[8] the Government introduced an amendment to the *Crime and Disorder Bill*. Following a free vote the amendment was passed by a 207 majority (336 to 129) in what was called a 'landmark decision 31 years after homosexuality was first legalised in Britain'.[9] However, the following month in the House of Lords a majority of 168 (290 to 122) overturned the decision of the Commons, keeping the age of consent for homosexuals at 18.[10] More recently, in April 1999, the *Crimes Sexual Offences (Amendment) Act* was again blocked in the House of Lords by a majority of 76 (222 to 146) after having passed the House of Commons in a free vote 281 to 82. The Bill had proposed three amendments: firstly it reduced the minimum age at which a person could lawfully consent to buggery from 18 to 16 in England, Scotland and Wales and from 18 to 17 in Northern Ireland; second, in all jurisdictions a person under the age of consent would not commit an offence themselves if they engaged in buggery or certain homosexual acts with a person over the age of consent, and third it introduced a 'position of authority' offence, where any person over the age of 20 convicted of the new offence would be subject to notification requirements under the *Sex Offenders Act 1997*.[11] Following this second block by the House of Lords, the Home Secretary vowed to re-introduce the Bill in November

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8 Article 8 of the European Convention on Human Rights provides that 'everyone has the rights to respect for his private ... life ...' and that 'there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of health or morals, or for the protection of the rights and freedoms of others'. Article 14 of the Convention provides 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or any other status'. The Commission found that the age of consent laws in the United Kingdom violated article 8 when taken in conjunction with Article 14 of the Convention. The report of the Commission can be found at http://www.dhcommhr.coe.fr/eng/25186R31.E.htm

9 Gay age of consent is cut to 16', *Electronic Telegraph*, 23 June, 1998.

10 In order to allow the rest of the Bill to proceed, the Commons dropped the proposal.

11 Sexual Offences (Amendment) Bill *Explanatory Notes*, available on the Stationary Office website: www.parliament.the-stationery-office.co.uk

1999 and, if necessary, invoke the *Parliament Act* to ensure its passage.[12]

In ***Australian*** jurisdictions, there has been a trend to increase penalties for child sexual offences. For example, in Victoria in 1997 the maximum penalty for sexual penetration of a child under 10 years was increased from 20 to 25 years, and in Queensland penalties for sodomy offences were doubled - for example the maximum penalty for sodomising a person under 18 years is now 14 years. The Victorian offence of sexual relationship with a child was amended in 1997 to remove the requirement that the accused be in a position of trust or authority over the child, and Tasmanian legislation was amended in 1997 so that the similar age defence does not apply in cases of anal sexual intercourse.

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12 G Jones, 'Gay age of consent to be 16 'by next year'', *UK Telegraph*, 24 July 1999. The *Parliament Acts 1911 and 1949* provide that, in the case of a public bill (other than a money bill) which is passed by the House of Commons in two successive sessions, and which, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, shall, on its rejection for the second time by the House of Lords, be presented to Her Majesty and become an Act of Parliament on the Royal Assent being signified to it. One year must elapse between the second reading of the bill in the House of Commons in the first of the sessions and its passing in the House of Commons in the second session. Only one Act has been passed under the procedure since the 1949 Act - the *War Crimes Act 1991* although two other bills have been introduced in a second session with a view to it. These bills, the Trade Union and Labour Relations Bill (1975-76) and the Aircraft and Shipbuilding Industries Bill (1975-76) were eventually agreed to by the House of Lords in the second session: Erskine May, *Parliamentary Practice* (22nd ed), 1997, p. 569.