

SUBMISSION  
TO THE  
LEGISLATIVE COUNCIL  
STANDING COMMITTEE ON SOCIAL ISSUES  
—  
INQUIRY INTO EQUAL AGE OF CONSENT

FROM ACON (THE AIDS COUNCIL OF NSW INC)  
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## 1. INTRODUCTION

ACON (AIDS Council of NSW) is a community-based organisation funded primarily by NSW Health providing education, health promotion, care and support, and advocacy services for members of the gay and lesbian communities including transgender people, Indigenous people and injecting drug users, to all people living with HIV/AIDS and to sex workers.

ACON has been providing education and support programs to the gay community since 1985 including a program for young men called Fun & Esteem (F&E). F&E is a program of workshops for gay and bisexual men under 26 years of age which provide sexual health information, education and support for men coming to terms with their sexuality. Since its inception in 1988 almost 10,000 men have participated in F&E at our Sydney office or a similar program in one of our branch offices.

Working with young gay and bisexual men over many years has provided us with specific insights into their experiences and needs which we believe will be invaluable to the Committee in its deliberations.

ACON strongly supports the *Crimes Amendment (Sexual Offences) Bill 2002* as it will:

- introduce equal treatment with respect to sexual offences against males and females; and
- remove the current discrimination against homosexual men by making the age of consent applying to them consistent with that applying to heterosexuals and lesbians.

This Bill will bring age of consent in NSW into line with Victoria, Tasmania, Western Australia, Queensland, ACT, New Zealand, Canada, UK, Rep of Ireland and other members of the European Community.

This Bill will also enabling health, education and social support services to better meet the needs of young homosexually active men by removing barriers contained in the present legislation.

## 2. LEGAL IMPACT OF CURRENT SITUATION

### 2.1 BACKGROUND

New South Wales is now the only Australian state which sets the age of consent for consensual homosexual sex higher than that set for heterosexual sex. What this piece of legislation means in NSW is that 16 and 17 year old heterosexual youths may have consenting sex with impunity while their male homosexual counterparts may not. For example a male who has sex with a female aged 16 or 17 years does not commit an offence whereas when two males have sex and one or both of them are 16 or 17 years of age both commit an offence. The impact of this is, in effect, to criminalise male homosexuality when homosexuality is not an offence in NSW.

Such a discriminatory age of consent is inconsistent with NSW legislation. The *NSW Anti-Discrimination Act* was amended in 1982 to make discrimination on the grounds of someone's homosexuality unlawful and the NSW Anti-Discrimination Board has supported the adoption of a uniform age of consent ever since.

This anomaly is a vestige of the *Crimes (Amendment) Bill 1984*, which decriminalised homosexuality between consenting adult males. At the time of this 'conservative reform' it was anticipated that it would be reviewed at a later time but no change has yet occurred.

A review of relevant legislation would show that equality between the sexes is a policy now actively pursued by the NSW Government, the law and other institutions in society. Likewise, outlawing discrimination on the ground of homosexuality is a policy pursued by the law in this State<sup>1</sup>. Yet the *Crimes Act* continues to discriminate in both regards.

The suggestion is sometimes made that boys mature later than girls and therefore it is necessary to have an age of consent for male homosexuality which is greater than for lesbianism. This argument ignores the fact that the age of consent for heterosexual boys is the same as for heterosexual girls, and is earlier than for male homosexuals.

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<sup>1</sup> Part 4C Anti-Discrimination Act 1977, outlawing discrimination on the ground of homosexuality, inserted by Anti-Discrimination (Amendment) Act 1982.

In other words, the ‘principle’ upon which the unequal age of consent for male homosexuals is predicated is what some would call homophobia – fear or hatred of homosexuality – and what others would call heterosexism – belief in the superiority of heterosexuality. Taken with Premier Wran’s stated reason for selecting the age of homosexual consent as 18, the real reason for this discrimination by the law can probably be distilled down to an attempt at deterrence, for as long as is politically palatable, to youths engaging in homosexual sex.

The problem with this line of reasoning is not just that it is contrary to principle – a principle which was made into law when discrimination on the ground of homosexuality was recognised as unacceptable by Parliament back in 1982 – but also that it is in conflict with reality. Available data tells us that, when homosexually active, boys tend to have sex with boys of the same age rather than with older men<sup>2</sup>. Further, if boys are going to have sex, they will do so irrespective of the law. But such data as is available also suggests that boys are not likely to have sex just because the law allows them to. They will have sex only when they are ready to do so.<sup>3</sup>

The unequal age of consent, the higher maximum penalties for male to male sexual offences and the denial to homosexuals of defences to charges of sexual crimes which are available to heterosexuals and lesbians, contribute to the view that homosexuals deserve less rights than other citizens. The criminal justice system thereby indirectly asserts to the community that male to male sexual contact is not to be placed on the same footing as other forms of sexual expression, and not to be given the same degree of approval. In this way, the criminal law of NSW supports those who justify mistreatment of and violence towards homosexuals by reference to some lower status which is attributed to homosexuals.

The term “homosexual advance defence” describes the phenomenon<sup>4</sup> which occurs under the law when the perpetrator of a gay hate crime of violence escapes justice by falsely playing upon the myth of the predatory homosexual

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2 A collaborative research project between Portsmouth University and the the Terrence Higgins Trust London Sigma indicates that 92.6% of the young gay men surveyed their first sexual experience was with a partner of the same age or slightly older

3 See Richard Roberts & Peter Maplestone *The Age of Consent and Gay Men in New South Wales* School of Social Work, University of New South Wales, Sydney, 2001, pp.31-8.

4 It is a phenomenon (not a legal defence) which employs existing legal defences such as self-defence and provocation.

and by playing upon latent homophobia in the community from which jurors are drawn – “*he patted me on the buttocks so I stabbed him 25 times and kicked his head in*”. Homosexual advance defence (called “homosexual panic defence” in the United States and England) is recognised as a significant problem of injustice produced by the criminal justice system<sup>5</sup>. It is precisely the signal to the community which the discriminatory age of consent and other such laws send, which led to a recommendation for an equal age of consent and the removal of discriminatory laws by the Attorney-General’s committee which investigated the problem of homosexual advance defence in NSW.<sup>6</sup>

As well as aforementioned attempts to equalise the age of consent in NSW several government inquiries and Royal Commissions have also called for a consistent and equal age of consent.

## 2.2 WOOD ROYAL COMMISSION

In the final report<sup>7</sup> of the Royal Commission into the NSW Police Service (1997), the Commission concluded that it saw no reason:

*“to perpetuate a distinction between consensual homosexual and heterosexual activity”.*

The Report also noted that:

*“on their face the various provisions of the Crimes Act:*

- *place less value on the protection of young females compared with young males;*
- *operate in a way that is discriminatory against male homosexuals;*
- *are inconsistent as to the availability of a defence;*
- *are unnecessarily complex, particularly in relation to areas of overlap, consent and circumstances of aggravation; and*
- *result in significant, and at times inexplicable differences in maximum penalty for similar conduct.*<sup>8</sup>

5 Final Report of the ‘Homosexual Advance Defence’ Working Group NSW Attorney-General’s Department, 1998; Tomsen Hatred, Murder and Male Honour *ibid*, pp.56-77. The incidence of the phenomenon is monitored by the NSW Government via the Attorney-General’s Homosexual Advance Defence Monitoring Committee.

6 Final Report pp.4 & 33-4.

7 Final Report – vol v: The Paedophile Inquiry 1997

8 Final Report Vol V: The Paedophile Inquiry 1997 Section 14.10 pp 1071

*“Legislative proscription of consensual conduct moves into shaky territory when it is based upon purely moral or religious grounds, particularly where they are the subject of genuinely divergent opinions”.*

*“Irrespective of legislative provision, freedom remains for parents and religious bodies to teach their children according to their own religious and moral values, as it does for those children to accept or reject them”.*

### **2.3 SECTION 78Q(2) CRIMES ACT 1900 – ITS IMPACTS ON HIV/AIDS & SEXUAL HEALTH SERVICES**

The effect of the current legislation is to isolate and marginalise gay and bisexual youth, frequently precluding them from obtaining a range of health and education services.

It has been argued that criminalisation of victimless conduct which involves behaviours risky for disease transmission makes it more difficult to achieve the widespread behaviour change needed to reduce those risks and poses a substantial impediment to early diagnosis of infection among those affected by such laws. The same applies to the public health problems posed by other sexually transmissible medical conditions.<sup>9</sup>

Australia has an enviable response to the HIV/AIDS epidemic, central to which is a sense of confidence in health authorities on the part of those at risk of HIV transmission. Criminal penalties attaching to such conduct mean that disclosure of risk status, disclosure of possible transmission events, or even just seeking testing for HIV, can lead to – perhaps more importantly, are seen as risking – criminal prosecution.<sup>10</sup>

Similarly, the offence created by section 78Q(2)<sup>11</sup> – soliciting, procuring, inciting or advising a male person under 18 to commit or be party to an act of

9 The Equal Age of Consent Bill Gay and Lesbian Rights Lobby, Sydney, 1995, p.2.

10 See generally Bebe Loff AIDS Prevention and the Law: A Discussion of the Legal Status of Prostitution and Homosexuality in Western Australia, Queensland and Tasmania Australian Federation of AIDS Organisations, Canberra, 1989; David Patterson “Legal Barriers to Youth AIDS Education” National AIDS Bulletin 1992(Feb);6(1):42.

11 “The Yeomans amendment”.

homosexual intercourse – makes counselling of gay youth about safe sex highly problematic.<sup>12</sup>

Further, criminalisation of conduct and social disapproval of desires innate to a person's very being takes a heavy toll on their self-esteem and reduces the likelihood of voluntary behaviour change as well as reducing respect for others at risk. Conversely, recognition of self-worth and acceptance as a valid member of society leads to the development of a positive individual and community identity, in turn demonstrably improving rates of behaviour change and thus protection of self and partners from the risk of infection.<sup>13</sup>

The impact of the discriminatory age of consent on this state's HIV/AIDS strategy has been investigated by a major Australian intergovernmental study on the subject<sup>14</sup> and two NSW government and semi government bodies.<sup>15</sup> Each time removal of these laws has been recommended. All have concluded that the suggestion that the reduction of the homosexual age of consent to 16 will result in an increase in HIV infection has no basis in fact.<sup>16</sup>

This isolation of gay and bisexual youth and lack of access to services is made worse by misconceptions held by community health and education workers<sup>17</sup>. Misconceptions about responsibilities and legal liabilities are widely held in youth, community, health and education services about the provision of services to sexually active homosexual youth, frequently resulting in poor service provision.

The lack of clarity about the provision of health and support services to gay and bisexual youth in relation to S78Q(2) Crimes Act forced ACON to seek legal advice (see Appendix 1).

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12 There is a detailed treatment of the problems caused for HIV/AIDS educators and counsellors by section 78Q2 in *Discrimination - The Other Epidemic : Report of the Inquiry into HIV and AIDS Related Discrimination* NSW Anti-Discrimination Board, Sydney, 1992 pp.47-8.

13 See generally, *HIV/AIDS Prevention, Homosexuality and the Law* Intergovernmental Committee on AIDS Legal Working Party, Dept. Community Services & Health, Canberra, 1991, and the sources referred to therein.

15 *Final Report on the Legal Working Party of the Intergovernmental Committee on AIDS* Dept. Community Services and health Canberra, 1992, pp 42-44, esp. recommendation 5.2

16 *Discrimination – The Other Epidemic* pp46-47; *The Courage of our Convictions: HIV/AIDS: The National Strategy and the Laws of NSW: Report to the Minister of Health by the NSW Ministerial Review HIV/AIDS Legal Working Party*, Sydney 1993, pp63 & 130

17 Roberts & Maplestone *ibid* pp.38-43.

17 'The age of consent and gay men in NSW', Roberts & Maplestone. p 54.

### 3. SOCIAL IMPACTS OF CURRENT SITUATION

#### 3.1 EFFECT ON HEALTH, WELL-BEING AND SELF ESTEEM OF YOUNG GAY & BISEXUAL MEN

Participants in ACON's F&E program frequently articulate the effect the law had on them prior to their becoming 18. They describe it as stifling their social development and affecting their attitude towards society, its institutions and the law, which they see as oppressing them just because they are different from the majority and from what is promoted as acceptable.

*"The unequal age of consent makes me feel like a criminal because I started having sex when I was 17, I still feel uneasy and that I'm not equal and somehow less than straight guys my age."* 18, F&E participant

The self perception of being a criminal held by many of these young men further isolates them because they believe they cannot access professional support, counselling or medical services. One of the gravest concerns about using health-related services raised by gay and bisexual youth in F&E, is being reported to the police or to their parents if they identify that they have been sexually active before their 18<sup>th</sup> birthday.

*"I wanted to be truthful and open about being gay, yet, I had to lie about my age to use the sexual health clinic, straight guys my age don't, if that isn't discriminatory I don't know what is".* 19, F&E participant

There is little doubt that stigmatisation of their sexuality and criminalisation of their sexual conduct are significant contributors both to the high rates of violence towards boys perceived as gay and to the rates of male youth suicide in Australia.<sup>18</sup> As the Committee has already noted,<sup>19</sup> this is particularly so in regional areas where support from counselling services and where positive role models are simply not available. These rates of violence and self-harm are the visible signs of what must be significant psychological harm suffered by young males who believe they are or might be gay.

18 See, eg, G Remafedi "Male Homosexuality: The Adolescent's Perspective" *Pediatrics* 1987;79(3):326-30; P Gibson "Gay Male and Lesbian Youth Suicide" in M Feinleib (ed.), *Report on the Secretary's Task Force on Youth Suicide vol.3*, US Dept. of Health, Washington, 1989; P McColl "Homosexuality and mental health services" *British Medical Journal* 1994;308:550-551; Robert Garofalo, R. Cameron Wolf, Shari Kessel, et al "The Association Between Health Risk Behaviors and Sexual Orientation Among a School-based Sample of Adolescents" *Pediatrics* 1998;101(5):895-902; Jay P. Paul, Joseph Catania, Lance Pollack, et al "Suicide Attempts Among Gay and Bisexual Men: Lifetime Prevalence and Antecedents" *Am J Public Health* 2002;92(8): 1338-1345. Because it draws upon, amongst others, Australian sources, see in particular Roberts & Mapstone *ibid*, especially pp.52-3.

19 Standing Committee of Legislative Council on Social Issues *Suicide in Rural New South Wales*, NSW Parliament, 1994, pp.79-81.

#### 4. IMPACT OF THE ENACTMENT OF THE *BILL*

Through these amendments to the *Crimes Act* this Bill will:

- confer the same protection in NSW on males and females removing the distinction between consensual homosexual and heterosexual sex;
- remove the anomalies between the Crimes Act and the Anti-discrimination Act 1977 thereby equalising rights and freedoms in line with law reform policy;
- decriminalise sexually active gay and bisexual youth and their partners putting an end to sexually active gay and bisexual men aged 16 and 17 years from coming into contact with the NSW legal and judicial system and having convictions recorded against them;
- enable health, education and social support agencies to provide appropriate comprehensive services; specifically enable counselling and support services to meet the emotional and psychosocial needs of young men experiencing confusion, harassment and distress upon coming to terms with their sexuality; and
- assist in overcoming community confusion about sexual molestation, paedophilia and homosexuality.

#### 5. ARGUMENTS OPPOSING ENACTMENT OF THIS *BILL*

##### PAEDOPHILIA

The most frequent argument mounted against previous attempts to equalise the age of consent in NSW for gay and bisexual men has been that equality will somehow open a door for 'paedophile networks'. This is clearly ridiculous.

ACON strongly condemns paedophilia. We support strict legal penalties and stringent clinical responses to address this particular paraphilia. We do not, however, support a definition of paedophilia which is based on the age of consent applying at the time rather than on clinical guidelines.

According to the Merck Manual paedophilia is:

*“A preference for repetitive sexual activity with pre-pubertal children, usually beginning in middle age<sup>20</sup>. Arbitrarily, the age difference between the adult with this disorder and the child victim is set at 10 years or more. When the child is post-pubertal, the disorder frequently is labelled as child molestation rather than paedophilia, but the distinction is often arbitrary. Paedophiliacs prefer opposite sex children to same sex children 2:1.”*

The diagnostic criteria for paedophilia is:

- a) *“over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving sexual activity with a prepubescent child or children;*
- b) *the fantasies, sexual urges or behaviours cause clinically significant distress or impairment in social, occupational, or other important areas of functioning;*
- b) *the person is at least 16 years and at least 5 years older than the child or children in Criterion A.<sup>21</sup>”*

This bill decriminalises gay and bisexual men between 16 and 18 years. It does not encourage paedophilia.

#### **PREDATORY OLDER GAY MEN**

Another argument mounted against an equal age of consent has been that of encouraging ‘predatory older gay men’.

Research into the first sexual experiences of young gay men in the UK does not bear this out. Sigma Research<sup>22</sup> indicates that 92.6% of the young gay men surveyed indicated that their first sexual experience was with a partner of the same age or slightly older, 98% indicated that their first homosexual experience was consensual.

20 The Merck Manual 15th Edition 1987, pp1498

6 Diagnostic and statistical manual of mental disorders (4th Edition), 1996, American Psychiatric Association. pp 527

7 A collaborative research project between Portsmouth University and the the Terrence Higgins Trust London

### **ENCOURAGING YOUNG GAY MEN TO HAVE SEX EARLIER**

A further argument runs the line that young gay men will have sex earlier. Davies et al using the Sigma research cohort (1295 men in all) found that the average age for first anal sex experience to be 20.9 years compared to first sexual experience at 15 years. Further, there is no evidence that the age of consent set by law determines the age at which a young person first has sex.

### **WILL INCREASE RATES OF HIV INFECTION**

Arguments have previously been mounted that equalising the age of consent will increase the rates of HIV infection. The annual diagnoses of HIV infection in NSW continue to decline<sup>23</sup> from 362 in 2000, to 347 in 2001 and 143 as at the 30<sup>th</sup> June 2002, while the median age for gay and bisexual men diagnosed in the same period remains at 34 years.

The removal of impediments to the provision of accurate sexual health information will strengthen the HIV/AIDS educational response<sup>24</sup> enabling young men to seek information at a time when they are formulating their sexual identity.

## **6. CONCLUSION**

ACON strongly supports the passage of this important legislation as it will:

- remove discriminatory provisions which have a negative impact on the self-esteem of young gay and bisexual men and which contribute to high rates of youth suicide and anti-gay violence;
- improve the health and well being of young gay and bisexual men;
- enable gay and bisexual men aged 16 and 17 years to obtain sexual health information and advice appropriate to their needs; and
- put an end to gay and bisexual men aged 16 and 17 years coming into contact with the NSW legal and judicial system, and having convictions recorded against them simply for having a normal sexual experience.

<sup>23</sup> HIV surveillance report, NSW Health, Delpech V

<sup>24</sup> Ibid.Final Report on the Legal Working Party of the Intergovernmental Committee on AIDS Dept. Community Services and health Canberra, 1992.