

TOWARDS HOMOSEXUAL EQUALITY IN AUSTRALIAN CRIMINAL LAW - A BRIEF HISTORY

by Graham Carbery

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Published by Australian Lesbian & Gay Archives, Inc,
First published 1993, second edition 2010, revised 2014

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INTRODUCTION

Laws regulating sexual behaviour, including homosexual behaviour, are the responsibility of the State Parliaments of Australia - the Federal Parliament has no direct power to make laws in this area¹.

Originally the laws regulating sexual behaviour in Australia came from England. This was because when Australia was first settled by the British in 1788 they viewed it as being *Terra Nullis* (an empty land), so the laws of England applied to the new colony from its beginning. At the time of federation (1901), the Australian States each inherited the anti-homosexual laws of Britain's Act of 1898 which they incorporated into their criminal law with minor, but sometimes significant, variations between the States. For example there were different penalties for the crime of buggery (anal intercourse): which in Victoria, in some circumstances, was punishable by the death penalty until 1949² (thereafter 20 years imprisonment, later reduced to 15 years), and in NSW by life imprisonment until 1924 (thereafter 14 years imprisonment). The penalty in Victoria before 1949 was even harsher than Britain, which had abolished the death penalty for buggery in 1861 (in favour of life imprisonment). Also there were significant differences in wording between the States' laws against soliciting for sexual purposes in public places. Western Australia, for instance, was the only State to follow Britain in making soliciting an offence only if it were "persistent". All States except Victoria had laws against soliciting for "immoral sexual purposes", while Victoria, in 1961, enacted specific laws against homosexual soliciting and loitering³ (and no comparable laws for heterosexual conduct except when it was for purposes of prostitution).

Britain's law in 1898 had evolved since 1533 when Britain ceased being ruled by the ecclesiastical (church) courts, and sexual offences became part of the common law. The common law nevertheless continued to reflect church teachings on the sinfulness of sexual acts between males. Over the course of the twentieth century, the notion of homosexuality as sinful gave way to the medical view of homosexuality as a sickness or maladjustment. In the period

¹ The *Human Rights (Sexual Conduct) Act 1994* (Cwth) (No. 179 of 1994) is the first example of Commonwealth legislation that encroached on the ability of States to determine the content of their criminal laws. For a more detailed explanation see the Tasmania section of this article.

² The death penalty was mandatory for persons convicted of buggery either with a person under the age of fourteen or with violence - s. 65 (1) *Crimes Act 1928* (Vic). The death penalty was abolished in 1949 - see: *An Act to amend the Law relating to Crimes and Criminal Offenders 1949* (Vic), No. 5379. s. 2 (1) e) In sub-section (1) of section sixty five for the words "shall upon conviction thereof suffer death as a felon" there shall be substituted the words "shall be guilty of felony and upon conviction thereof shall be liable to imprisonment for a term of not more than twenty years

³ Section 3 b) of the *Prostitution Act 1961* (Vic) repealed s.28 of the *Police Offences Act 1958* (Vic). This section was limited to soliciting and loitering for the purposes of prostitution and it was substituted with an expanded s. 28 under the heading "Common Prostitutes and Homosexuals", which also made it an offence for males to solicit other males or loiter for "immoral purposes". In 1966 these offences were incorporated in the new *Summary Offences Act* and the language was changed – s.18 "Any person who for the purposes of prostitution or for homosexual purposes solicits or accosts any person in a public place or loiters in a public place shall be guilty of an offence."

since World War II both views have been challenged by homosexuals' assertion of their own worth - neither sick nor sinful, just different - forcing a re-appraisal by sections of the medical profession and, increasingly, by sections of the church.

British law never made it a crime to be homosexual; only homosexual behaviour between males was outlawed, regardless of whether the people involved had consented or not. And so it has been in Australia - although the now-repealed Victorian law against loitering for homosexual purposes, which had no equivalent in other States, came perilously close to being a "thought crime".

While all Australian States outlawed sexual behaviour between males, the law was silent on the question of lesbian behaviour. It is difficult to know why this was the case but it probably had a lot to do with the commonly held 19th century belief that unlike men, women did not have strong sexual desires, therefore the possibility of women being sexually attracted to other women did not occur to (male) politicians. This is not to say that lesbian behaviour was beyond the law. For example, non-consensual sex involving two women, as well as sexual acts between adult women and girls, were covered by laws against indecent assault.

Laws which carried prison sentences for private and consenting sexual behaviour between males were still being enforced in most Australian states even until the mid-1970s (and in Queensland until the late 1980s). In Victoria, for instance, crime statistics show that the law against buggery was enforced 172 times in 1973, 81 times in 1974 and 92 times in 1975. It is not known how many of these relate to non-consensual crimes (where the other person was not a willing participant), but there were several known cases of police arresting adult men for engaging in consensual sex with other men in private until the mid-1970s.⁴

The first Australian politician to attempt to liberalise laws that criminalised male homosexual behaviour was Don Dunstan. As Attorney-General in South Australia in the mid-1960s, Dunstan had a homosexual law reform bill drafted; however, he decided not to proceed with the bill as he judged there was a lack of public support for change at that time.⁵

The 1970s saw two Australian jurisdictions enact law reform legislation, and these were much influenced by Britain's reform of its anti-homosexual laws in 1967. The British precedent was unfortunately out of date by that time, based as it was on a report presented to Government some 10 years earlier, and reflecting none of the changed attitudes towards homosexuality that emerged with the Gay Liberation movement in the early 1970s. Thus South Australia's reform of 1972 (and the ACT's of 1976) did not come to grips with the concept of legal equality for homosexuals, whereas the South Australian reform of 1975 embodied the equality principle and was a landmark for homosexual law reform in Australia.

⁴ For example, see Victoria section of this article and read Phillip Adams' comments published in *The Age*, 9 April 1975.

⁵ South Australian Parliamentary Debates, House of Assembly, 2204-05, 18 October, 1972.

The emergence of AIDS in Australia (first case reported late 1982) had a mixed impact on moves for homosexual law reform. The South Australian, ACT and Victorian reforms clearly preceded AIDS in Australia and the NSW reform was achieved in the very earliest days of the epidemic. In the years that followed, AIDS organisations and many public health advocates called for decriminalisation of homosexuality in those states where anti-homosexual laws remained, so that homosexually-active men could take advantage of safe sex education and HIV testing without fear of legal repercussions. While this argument had undoubted force, and was clearly a factor in the Queensland Parliament's decision to reform the law,⁶ it was rejected as a justification for law reform in Western Australia.⁷ A few years later, in 1991, the Legislative Council in Tasmania rejected the HIV/AIDS Preventive Measures Bill which had been passed by the House of Assembly, which would have decriminalised most homosexual acts as part of its public health policy.

The criminal law in all Australian jurisdictions ceased treating heterosexual and homosexual conduct differently in 2003, when NSW brought the age of consent for same-sex and opposite-sex conduct into line. However the reformed laws differ across states, particularly in the way they treat age of consent.

Victoria and the ACT have graduated ages of consent which allow minors under a nominated age to consent to sex with a person of comparable age. Victoria and the ACT both have a general age of consent of 16, but it is a defence for a person between the ages of 10 and 16 to have consensual sex with a person no more than two years older than them. Tasmania has similar provisions provided the sexual act is not anal intercourse – more on this below.

South Australia, NSW, Victoria, Western Australia and the Northern Territory have a higher age of consent for sex with a person who is under their care or supervision or authority. The terminology is slightly different in different states (eg. "special care" in NSW and NT), but the provisions apply to school teachers, youth leaders etc. In South Australia, for example, the general age of consent is 17, but is 18 with a person who is under their authority. In Victoria, NSW, NT and WA, the general age of consent is 16, but 18 with a person who is under their authority.

All states and Territories except NSW have "reasonable belief" defences as to age. Under these provisions, an accused person has a defence if they can show that they reasonably believed their sexual partner was of or above the relevant age of consent. In Western Australia, there is no defence of reasonable belief

⁶ See the Preamble to the *Criminal Code and Another Act Amendment Act 1990* (Qld) which, in part, states: "AND WHEREAS rational public health policy is undermined by criminal laws which make those who are at high risk of infection unwilling to disclose that they are members of a high risk group."

⁷ In May 1987 the Western Australian Labor Government allowed one of its backbenchers, Bob Hetherington, MLC, to introduce a private member's bill to remove homosexual offences from the Criminal Code. Hetherington argued law reform was necessary to encourage people to seek information about HIV/AIDS and be tested for HIV. On 18 June 1987 the Legislative Council voted 14-13 to defeat the bill, the fourth time homosexual law reform had been rejected by the parliament of Western Australia.

as to age if the accused is in a position of authority over a sexual partner under 18.

Three states – South Australia, Queensland and Tasmania - have different ages of consent according to the type of sexual acts involved. In South Australia, the age of consent for sexual intercourse is 17, but 16 for other sexual acts. The higher age of consent in South Australia applies to both vaginal and anal intercourse, but in Queensland only engaging in anal intercourse attracts a higher age of consent, 18, whereas for other sexual acts the age of consent is 16. Although the prohibition on engaging in anal intercourse applies to all people under 18 in Queensland it arguably restricts the sexual options available to 16 and 17 year old homosexually-active people more than it does their heterosexually-active contemporaries.

In Tasmania, where the general age of consent is 17, there are defences to having sex with a person under 17 provided the sexual act is other than anal intercourse. The partner could be 12 or more provided the accused is no more than 3 years older, or 15 or more provided the accused is no more than 5 years older.

Details of the various state and territory ages of consent are in the charts at the end of this article.⁸

Equality under the law is only meaningful if the law is enforced equally, and this is where the role of the police comes in. As laws against soliciting were repealed, or worded in such a way as to discourage discriminatory application against gay people, a trend emerged whereby homophobic⁹ police officers found other means of harassing gay people. A good example was in the way "offensive behaviour" laws were used selectively against gay men in most states.¹⁰ Such discriminatory practices have been a focus of police-gay liaison processes which are now in place in most states.

While it is beyond the scope of this article, since the mid-1980s, we have seen great progress in achieving equality for lesbians and gay men in many aspects of the civil law. In 2009, the Rudd Labor Government gave same-sex relationships the same level of recognition as heterosexual de facto couples in Federal legislation in areas such as tax, health, superannuation and aged care.¹¹ For an overview of these and other civil law changes, and for analysis of remaining areas of inequality, see the Wikipedia site, "LGBT rights in Australia" at http://en.wikipedia.org/wiki/LGBT_rights_in_Australia

⁸ See chart outlining each state's homosexual law reforms on pp.50-53, and details of age of consent laws of each Australian state as at March 2010 on pp. 54-57

⁹ Homophobia is the irrational fear and hostility expressed towards homosexuality and homosexuals.

¹⁰ For an account of one successfully contested case see Gardiner, Jamie, "The offensive behaviour of our police: how Oscar Wilde took on violent cops and redefined gay legal rights", *Melbourne Star Observer*, No. 180, 7 August 1992, p. 4

¹¹ See *Same Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008* (Cwth) No. 134 of 2008 and the *Same Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act* No. 144 of 2008 came into effect 1 July 2009.

SOUTH AUSTRALIA

The first step along the road to achieving homosexual law reform in South Australia was the decision of Don Dunstan, as Attorney-General in the Walsh Labor Government in the mid-1960s, to have a homosexual law reform bill drafted. Some years later Dunstan explained why his proposal was not acted on: "I did not proceed with it then because the climate of public opinion was not such that I believed we could obtain a sufficient consensus of opinion to support an amendment to the law."¹²

Dunstan became Premier of South Australia in 1967 when Frank Walsh retired, but lost the 1968 election. He became Premier again when Labor won the 1970 election. Dunstan maintained an interest in homosexual law reform, but chose to exert influence behind the scenes rather than be publicly identified with the issue. For example, in December 1971 the government set up an enquiry to review the operation of the criminal law in South Australia, and one of its terms of reference was consideration of decriminalisation of homosexuality.¹³

It was the death of gay academic, Dr George Duncan on 10 May 1972, however, that was a major factor in bringing about the first of two reforms of South Australia's anti-homosexual laws. It focused public attention on the widespread harassment of homosexuals in Adelaide by police. Dr Duncan and another man were thrown into the Torrens River by police at a spot well known as a homosexual "beat", ie. a place where homosexual men meet, often for the purpose of having sex. Dr Duncan could not swim and drowned.

During the Coroner's inquest into Dr Duncan's death a group of people who were outraged at what had happened formed the Moral Freedom Committee (this was not a homosexual group) and wrote to members of the South Australian Parliament. The letter argued that had sex between males been legal more witnesses might have been willing to come forward and give evidence. On 1 July 1972 the morning daily newspaper, *The Advertiser*, published an editorial which supported the call for homosexual law reform.¹⁴

It was not long before there was a political response to mounting public concern about the circumstances surrounding the death of Dr Duncan. Within a week of the editorial in *The Advertiser*, an Opposition member of the Legislative Council, Murray Hill (Liberal Country League), announced he would introduce a private member's bill. The newly-formed South Australian branch of the gay rights organisation, Campaign Against Moral Persecution (CAMP), had no role in initiating this bill, but met with Hill to offer support.

¹² South Australian Parliamentary Debates, House of Assembly, 2204-05, 18 October, 1972.

¹³ The first of the Mitchell Committee's three reports was tabled in parliament in July 1973. Mitchell, Roma, Howard, Colin and Biles, David: "Criminal Law and Penal Methods Reform Committee of South Australia. First Report: Sentencing and Corrections." Parliamentary Paper 91, Government Printer, SA, 1973. pp. 68-69; 89-94. See also: Magarey, Susan and Round, Kerrie, *Roma the first: a biography of Dame Roma Mitchell*, Kent Town, SA, Wakefield Press, 2007.

¹⁴ "Legalise homosexuality", *The Advertiser*, 1 July 1972.

They also wrote to other politicians and produced and distributed 1,000 badges which read "SUPPORT HOMOSEXUAL LAW REFORM".

Although Hill was regarded as being a progressive member of the conservative Liberal Country League he made it clear he did not support homosexual equality and that his bill would be limited to "...protect[ing] the privacy only of those people who lived together."¹⁵ He also said his bill "...certainly would not seek to put the seal of moral approval on homosexuality as such, nor would it condone this sort of behaviour. Homosexual acts in public would remain unlawful on the grounds that they offended accepted standards of public decency."¹⁶

Murray Hill's bill was limited to decriminalising homosexual acts in private between consenting males over 21. It defined "in private" as involving no more than two people and not in "a lavatory to which the public have or are permitted to have access."¹⁷ Hill's reference to "lavatory" was a reference to beats and intended to discourage homosexuals from meeting in, or congregating near, public toilets.¹⁸

Even this limited reform proved too much for the conservatives in the Legislative Council and during the committee stage their leader, Ren DeGaris, moved an amendment that destroyed the purpose of the bill, ie. the decriminalisation of some homosexual conduct. Under DeGaris's amendment all male homosexual conduct would remain illegal, but a defence would be available to a person charged with a homosexual offence if the accused could show that the offence occurred in private between two consenting men over 21.¹⁹

The DeGaris amendment was adopted in the Legislative Council and after a conscience vote the amended bill was passed. However, the bill received a hostile reception when it was debated in the House of Assembly, and it not only removed the DeGaris amendment, it included an age of consent of 18. Not surprisingly, when the bill returned to the Legislative Council the DeGaris amendment was reinstated and age of consent clause was removed. The bill was sent back again to the House of Assembly and this time they gave in²⁰, and after a conscience vote, it passed the *Criminal Law Consolidation Act Amendment Bill*.²¹

The 1972 reform was thus very limited, and fell far short of bringing homosexual and heterosexual conduct into equality under the criminal law.

¹⁵ Reeves, Tim, "The 1972 debate on homosexuality in South Australia", *Gay Perspectives II: more essays in Australian gay culture*, ed. Aldrich, Robert, Sydney, University of Sydney, 1994, p. 163.

¹⁶ Ibid, p. 163.

¹⁷ Ibid, p. 169.

¹⁸ The site of Dr Duncan's murder was 100 metres from a public toilet, a well-known homosexual beat since about 1910, see footnote 45 on p. 183 of Reeves, Tim, op cit.

¹⁹ Reeves, Tim, op cit, p.174.

²⁰ See Letter to the editor from Don Dunstan, former Premier of South Australia, *Sydney Star Observer*, No. 154, 5 April 1991, p. 11. See also Watson, Lex, "Homosexual legislation", *Camp Ink*, Vol. 2 No. 10, August 1972, pp. 8-9. For a detailed account of events leading to the 1972 change in South Australia, see pp. 149-192, Reeves, Tim, op cit.

²¹ After receiving the royal assent the bill became the *Criminal Law Consolidation Act Amendment Act, 1972* (S.A.), No. 94 of 1972.

In September 1973 Peter Duncan, a recently elected Labor back-bencher who was dissatisfied with the conservatism of the 1972 reform, introduced a private member's bill to remove specific references to sexual acts between males in the criminal law and to provide a single code of sexual behaviour regardless of sex or sexual orientation. By this time, CAMP (SA) and the more radical gay groups were better prepared, and lobbied politicians to vote for law reform. Peter Ward, a member of Premier Don Dunstan's staff, worried that the actions of gay activists might stir up controversy and opposition to the proposed reform, contacted Gay Activists' Alliance (GAA) and informed them that: "...the Government supported the legislation and GAA should tread carefully to ensure its safe passage."²² As it turned out public debate on the bill was hijacked by its opponents following comments attributed to GAA about the desirability of educating secondary school students about homosexuality.²³ Despite the controversy the bill was passed by a comfortable majority in the House of Assembly, but was defeated in the Legislative Council on 21 November 1973 on the casting vote of the speaker.

Following the re-election of the Dunstan Labor Government in 1975, Peter Duncan, still a backbencher, re-introduced his 1973 private member's bill in August 1975. Peter Ward again assured the gay community of Premier Dunstan's support for the bill, and anxious to avoid a repeat of the controversy that accompanied the 1973 bill, met with representatives of CAMP to devise a strategy to minimise the chances of unhelpful comments being made by gay activists.²⁴ This time the bill passed in both houses without amendment.

The significance of the *Criminal Law (Sexual Offences) Amendment Act 1975*²⁵ was that it abolished the offences of buggery, gross indecency and soliciting for immoral sexual purposes, and provided an equal age of consent for homosexual and heterosexual sex. The Act was also gender neutral using the word "person" in all the sections which had previously specified the sex of either the victim or offender.²⁶

The age of consent for both homosexual and heterosexual intercourse (vaginal and anal penetration including oral sex) in South Australia is 17, but for other acts of a sexual nature the age of consent is 16. However, there are circumstances in which it is lawful to engage in sexual intercourse with a 16 year old. Section 49 (4) of the *Criminal Law Consolidation Act 1935* provides a defence to a charge of engaging in an act of sexual intercourse with a 16 year old if: a) the person charged was under the age of 17 on the date of the alleged offence, or b) if older, the accused believed on reasonable grounds that the other person was 17 or older. However, under no circumstances is it

²² Cowan, Malcolm, and Reeves, Tim, "The 'gay rights' movement and the decriminalisation debate in South Australia, 1973-1975." Published in *Gay and Lesbian Perspectives IV: Studies in Australian Culture*, edited by Aldrich, Robert and Wotherspoon, Garry, Sydney, The University of Sydney, 1998 at p. 176.

²³ Ibid, pp. 179-184

²⁴ Hilliard, David, and Knight, Roger, "20 Years On, 1975-1995: the campaign that led to the passing of homosexual law reform legislation in South Australia in 1975", 1995, held at Darling House Community Library, Adelaide, catalogue number GR 147, pp. 2-3.

²⁵ The *Criminal Law (Sexual Offences) Amendment Act, 1975* (S.A.), No. 66 of 1975 amended the principal act, the *Criminal Law Consolidation Act 1935* (S.A.)

²⁶ These changes have now been incorporated in the *Criminal Law Consolidation Act 1935* (S.A.).

lawful to engage in other acts of a sexual nature (such as masturbation) with a person under the age of 16.²⁷

Recognition of the significance of Don Dunstan's role in achieving homosexual law reform in South Australia is recent and due in large part to research in progress by Dino Hodge towards a biography of Dunstan. Commenting on the successful passage of Peter Duncan's 1975 bill, Hodge says: "Two points are to be noted here. [Peter] Ward's behind-the-scenes involvement with both of Duncan's Bills is an extraordinary step for a senior member of a Premier's staff to take: no staffer from the Premier's office, no matter how senior, would lightly give an undertaking about the government's intentions and provide secret encouragement to a lobby group without the prior knowledge and permission of the Premier himself....And secondly, while Duncan introduced pioneering legislation into the Parliament to be voted upon, it was Dunstan who first initiated the drafting of legislation in the 1960s."²⁸

The 1975 South Australian legislation proved to be a landmark in its approach to the law on sexual offences. It set an example to other Australian States of a more rational approach to regulating sexual behaviour: removing unnecessary distinctions in the way the law treated homosexual and heterosexual behaviour, and limiting the scope for double-standards in the way that men's and women's sexual conduct is viewed by the law.

²⁷ Criminal Law Consolidation Act 1935 s.58 (2).

²⁸ Comments from a paper titled: "The okayness of gayness: Don Dunstan's record in homosexual law reform", delivered by Dino Hodge at the Australia's Homosexual Histories Conference 9 held at the University of Melbourne, 4-5 December, 2009. A copy is held in the Australian Lesbian & Gay Archives, Melbourne (Articles and Pamphlets, No. 1260).

VICTORIA

The subject of homosexual law reform was first raised in Victoria in 1969 when members of the Humanist Society and the Rationalist Society prompted public debate on the issue. The Humanist Society conducted a survey of 100 homosexual men and published a pamphlet setting out the case for reform. When Society Five, Victoria's first openly organised homosexual group, was formed in 1971 it quickly established a sub-committee to look at the question of law reform.²⁹ The committee succeeded in raising the profile of homosexuals' demands by writing letters to the press, speaking on radio, and sending speakers to a range of professional and community groups. The people who went public in those times did so at considerable risk, because the attitudes of many people were far from enlightened. Even heterosexuals who argued that the law should be changed risked being labelled as being homosexual, and any homosexual who dared to "come out" faced the very real threat of losing their job and friends.

Society Five's law reform committee also developed a network of supportive contacts in political parties and churches and in the space of four years achieved considerable success. It managed to have motions of support for reform adopted by the policy-making bodies of the two major political parties in Victoria - Liberal Party State Council in 1974 and the Labor Party State Conference in 1975 - and by the Synod of the Anglican Church in 1971, the Methodist Church of Australasia's General Conference in 1972 and the Presbyterian Church of Victoria's State General Assembly in 1974.

In early 1975, an incident occurred which began to focus public attention on the absurdity of Victoria's anti-homosexual laws and the randomness with which they were enforced by police. Media commentator, Phillip Adams, reported the incident in *The Age* as follows:

...Acting on a tip-off of an anonymous informant, the police raided the home of a quiet, middle class homosexual couple whom we'll call Lindsay and John. They were dragged into the bedroom and interrogated one at a time.

In the mistaken belief that a relationship like theirs was perfectly legal behind closed doors, Lindsay and John spoke frankly of their lives together. And it was this information, freely given, and not the evidence of the informant, that formed the basis of the subsequent prosecution.

Believe it or not, the men were charged with the ancient crime of buggery. Moreover, on hearing they were still cohabiting, the magistrate sentenced them to transportation to South Australia, where such relationships between consenting adults are legal.

You may have heard Lindsay and John being interviewed on PM (a radio program). They spoke of their deep love for each other and of their plans - now shattered - to buy a home together. As a result of the magistrate's extraordinary sentence, they'll have to leave their jobs and friends. All because someone in the Victoria Police - those men of

²⁹ The Humanist Society of Victoria's pamphlet, "The homosexual and the law" was re-published by Society Five in 1971. Copies held at the Australian Lesbian and Gay Archives: Humanist Society Victoria ephemera file (for the original version) and Society Five papers, box 2 (for the republished version).

*upright morals and truncheons - disapproved of what was going on behind their venetian blinds*³⁰.

Not long after this incident the first parliamentary move towards homosexual law reform in Victoria occurred when, in October 1975, Barry Jones, MLA, who was at that time a member of the Labor Opposition in the Victorian Parliament, introduced a private member's bill into parliament.

Titled the *Crimes (Sexual Behaviour) Bill 1975*, the "Jones Bill" was only a partial reform because it only proposed to decriminalise those homosexual offences mentioned in the Crimes Act, i.e. buggery (anal intercourse) and gross indecency (which at that time in Victoria usually meant oral sex and/or masturbation). The bill did not propose removing the offences which were most commonly used against male homosexuals at that time, ie. soliciting for homosexual purposes and loitering for homosexual purposes, both of which were in the *Summary Offences Act*. The bill also proposed an age of consent of 18 for sexual conduct between males, whereas the age of consent for equivalent heterosexual sexual conduct was 16. Although the bill was introduced into the Legislative Assembly it was not debated and did not proceed beyond the first reading stage.

It was in 1976, largely in response to the inadequacies of Barry Jones' bill and the general lack of interest shown by politicians in the issue of law reform, that homosexuals in Victoria began to lobby politicians in a more organised way. The Homosexual Law Reform Coalition (HLRC), representing the spectrum of gay groups then in existence in Melbourne, was formed. Its role was to speak to the public, and to Government, with a strong and united voice calling for equality for homosexuals under the law. Candidates for the 1976 State election were canvassed for their views on gay equality and the results released to the press - adopting the successful strategy of the Women's Electoral Lobby, then four years old. Barry Jones was approached again and he indicated his willingness to support equality legislation.

A few months after its formation, the HLRC gained widespread publicity when it highlighted the provocative way in which police sought to enforce the law against male homosexuals.³¹ Throughout the summer of 1976-77 police arrested more than 100 men for homosexual offences at Black Rock beach, a well known meeting place of homosexual men. Young policemen were sent to Black Rock to act as decoys and entrap suspected homosexuals. They were dressed in swimwear and acted provocatively by posing as homosexuals and engaging other men in conversation. When the policeman was satisfied the person was homosexual an arrest was made. Most of the men arrested were charged with loitering or soliciting for homosexual purposes. Some were charged with having behaved in an offensive manner because the police found them sun-bathing nude in the shrubs near the beach.

The level of criticism of police tactics by the media and members of the public following the Black Rock arrests, led to calls for the law to be changed. *The*

³⁰ Adams, Phillip, "Boys in blue", *The Age*, 9 April 1975, p. 8. A recording of the interview by David de Vos with "Lindsay" and "John" on ABC Radio (PM), April 1975 (exact date unknown) is held by Australian Lesbian and Gay Archives (CD 118).

³¹ Rentsch, John and Carman, Gerry, "Police go gay to lure homosexuals", *The Age*, 12 January 1977, p. 3.

Age newspaper published an editorial supporting the principle of homosexual law reform under the heading "Sex laws ought not have bias"³². The Premier, Rupert Hamer (Liberal) responded by asking the Attorney-General, Haddon Storey, to consider the matter. The HLRC increased its lobbying of politicians and urged gay people to write to their local member of parliament. The HLRC also met with representatives of an Equal Opportunity Advisory Committee which had been formed to report to the Premier on "the decriminalisation of consensual homosexual offences."

In early 1977, another attempt at homosexual law reform was made when Jack Galbally (Labor), Leader of the Opposition in the Legislative Council, introduced a private member's bill that was in effect a second attempt by Barry Jones. The "Jones/Galbally Bill" was an equality bill, based on the South Australian reform of 1975. It proposed an equal age of consent, 16, and repeal of all specific homosexual offences in both the *Crimes Act* and the *Summary Offences Act*. The Jones/Galbally bill also contained provisions for a three year differential age scale formula, effectively a means of legalising sex between young people of comparable age.³³ This bill had a second reading in the Legislative Council on 23 March 1977, but like its predecessor did not go any further.

In mid 1977 the Attorney-General met with a delegation from the HLRC but Mr Storey indicated he was not satisfied there was community support for the HLRC's proposal for equality between homosexual and heterosexual sexual conduct. Following its meeting with the Attorney-General, the HLRC contacted Irving Saulwick, pollster for *The Age*, who agreed that when he next conducted a poll he would test attitudes towards homosexual law reform. The question put would be whether people agreed or disagreed with the statement: "sexual acts between persons of the same sex should be treated by law in the same way as sexual acts between persons of different sexes." The results of the poll were published on 10 May 1978 and showed that 57% of those surveyed agreed with the statement while only 30% disagreed. The HLRC now had hard evidence to show that public opinion supported equality under the criminal law for homosexuals and that a change was needed.³⁴ By this time there was also the precedent of the South Australian reform of 1975 which was based on the principle of not discriminating between male or female, heterosexual or homosexual. Further support came from the Report of the Royal Commission on Human Relationships (set up by the Whitlam Labor

³² "Sex laws ought not have bias", editorial, *The Age*, 22 February 1977.

³³ The *Crimes (Sexual Behaviour) Bill 1977* was introduced into the Legislative Council by Jack Galbally in March 1977. The approach to age of consent in this bill was similar to recommendations of a five-year age differential by the Criminal Law and Penal Methods Reform Committee of South Australia (Justice Roma Mitchell's committee). In March 1976, the Mitchell Committee had recommended a lowering of the general age of consent to 16 in South Australia (instead of 17), but also allowing a person aged 14 or over to consent to sexual activity with a person not more than five years older than him or her. The Jones/Galbally bill proposed a three year differential instead of five years.

³⁴ The Homosexual Law Reform Coalition used the poll result as the basis for renewed campaigning, issuing to all Victorian Parliamentarians a booklet, *Equality for homosexuals now; A proposal for reform of the law relating to sexual offences*, May 1978, which detailed the legislative changes necessary to achieve equality, and included a draft Bill. Copy held by the Australian Lesbian and Gay Archives in the records of the Homosexual Law Reform Coalition.

Government) which contained a recommendation relating to equal laws for homosexuals.³⁵

Despite continued lobbying from the HLRC and others, it was not until late 1980 that the Hamer Liberal Government introduced legislation to remove homosexual offences from the criminal law. In keeping with recommendations by the Premier's Equal Opportunity Advisory Council³⁶, the bill had much in common with the South Australian legislation of 1975, treating homosexual and heterosexual conduct equally.³⁷ The definition of rape was widened to include the forcible penetration of anus or mouth (as well as vagina) by a penis and the forcible introduction of an object into the vagina or anus. A common age of consent was adopted (18 years in general, with various exceptions as outlined below), the offence of "the abominable crime of buggery" was abolished, as were the summary offences of soliciting and loitering for homosexual purposes.

In an attempt to limit the extent of homosexual law reform, dissidents within the Liberal Party, unhappy that the offences of soliciting and loitering for homosexual purposes were being repealed, succeeded in having a last-minute amendment included in the act. This amendment created a new summary offence of "soliciting for immoral sexual purposes". Even with the inclusion of this amendment nine members of the Liberal Party still crossed the floor and voted against their own party's reform.³⁸ Only the Labor Party voted unanimously to support the bill. The *Crimes (Sexual Offences) Act 1980* was nevertheless passed on 23 December 1980 and came into effect on 1 March 1981.

There was no attempt to define the words "immoral sexual purposes" in the act, but the parliamentary debate shows that supporters of this amendment regarded homosexual conduct as being immoral and they expected that police, in enforcing this law, would be of the same view.³⁹ There was confusion among police union representatives and police prosecutors as to what "soliciting for immoral sexual purposes" actually meant.⁴⁰ Was it to be assumed that soliciting for a homosexual purpose was inherently immoral whereas soliciting for a heterosexual purpose wasn't? It was left to magistrates, on a case by case basis,

³⁵ Final Report of the Royal Commission on Human Relationships, Vol. 5, page 107, para 47.

³⁶ See "Report of the Equal Opportunity Advisory Council to the Honourable R.J. Hamer, E.D., M.P., Premier of Victoria, the decriminalisation of consensual homosexual offences", undated, copy held by Australian Lesbian and Gay Archives, Articles and pamphlets collection, item 880 (unpublished).

³⁷ The *Crimes (Sexual Offences) Act (Vic)*, No 9509/1980.

³⁸ For a full account of the parliamentary debate on homosexual law reform in Victoria, see *Hansard*, 11 December 1980, pp. 5010-5081 and 17 December 1980, pp. 5468-5475 (for Lower House Debate) and 3 December 1980, pp. 4090-4137 and 4 December 1980, pp. 4259-4300 and 17 December 1980, pp. 5468-5474 (for Upper House debate). For a gay viewpoint on the debate, see Carr, Adam, "The great homosexual debate", *Gay Community News*, Vol. 3, No 1, February 1981, pp. 10-12.

³⁹ The contribution of Mr Morris Williams, a Liberal MLA, to the parliamentary debate on the bill included these comments: "... a large number of homosexuals have at least 1000 partners in their lifetimes... These homosexuals apparently solicit outside wretched public toilets, even within a kilometre of this place." See Carr, Adam, op cit.

⁴⁰ Carbery, Graham, "Solicitation and the law", *Gay Community News*, Vol. 4, No. 1, February 1982, pp. 16-19.

to decide what the term meant and in the absence of a Supreme Court precedent the ambiguity remained, which left the decision whether to charge a person to the discretion of individual police officers. In the years following the 1981 reform in Victoria, the gay press reported frequent instances of police harassing gay men in public places. While "soliciting for immoral sexual purposes" was not the only law that enabled such harassment ("offensive behaviour" was known to be used as well), the new soliciting law provided a convenient substitute for police who previously used the specifically anti-homosexual soliciting and loitering laws.⁴¹

Following the 1981 reform in Victoria it was not well understood that the general age of consent was 18 for both heterosexual and homosexual sex, although it was lawful, in certain circumstances, for people as young as 10 to consent to engaging in sexual activity with others. Section 48 (4) of the *Crimes (Sexual Offences) Act 1980* provided a defence to a charge of engaging in an act of sexual penetration with a person who was of or above the age of 10, but under the age of 16, if the accused was not more than two years older than the other person, or where the accused believed on reasonable grounds that the other person was of or above the age of 16. Section 49 (4) provided a defence to a charge of engaging in an act of sexual penetration with a person between 16 and 18 where an accused believed on reasonable grounds that the other person was of or above the age of 18; or where the accused was not more than five years older than the other person; or where the other person had had a previous sexual experience with someone other than the accused (the effect of this last provision was to protect virgins until age 18, while not punishing people who engaged in sex with non-virgins aged 16 and 17).

As a result of persistent lobbying by homosexual activists, the Cain Labor Government in its second term of office, introduced legislation in 1986 that repealed the summary offence of soliciting for immoral sexual purposes. This change was included in the *Prostitution Regulation Act 1986*,⁴² an act primarily concerned with reform of the laws relating to prostitution, although the offence of soliciting for immoral sexual purposes was unrelated to prostitution.

⁴¹ See for example, "Police deny entrapment allegations", *Melbourne Voice*, No. 14, 2 Aug 1985, p. 5, which claimed that Gayline (telephone service) in Melbourne was receiving four to six reports each week of police entrapment of gay people. Also see "Law change likely but arrests continue", *Melbourne Star Observer*, No. 33, 19 Dec 1986, p. 3, which claimed there had been 39 cases of "soliciting for immoral sexual purposes" reported by police in 1984. Of these, cases against 16 males and 11 females were proceeded with, suggesting the new law was being used against female prostitutes and gay men seeking sexual partners in public places. By comparison, the related charge of "offensive or indecent behaviour" (not affected by the new legislation) showed a total of 1,536 cases reported by police in the same year, of which 1,139 concerned males. It was not known how many of these cases concerned homosexual behaviour, but a solicitor who dealt with a number of such cases told *MSO* that he believed that "dozens" had been processed in recent months at Sandringham Magistrates' Court alone. The solicitor said that police out of uniform were frequently hanging around Melbourne beats "in the guise of somebody who is interested".

⁴² *Prostitution Regulation Act 1986* (Vic) No.124 of 1986. See "Immoral no more", *Melbourne Star Observer*, 28 August 1987, p. 3. Although the Act was passed in 1986, the section which repealed the offence of "soliciting for immoral sexual purposes" was not proclaimed until August 1987. The *MSO* report attributed the delay to the Liberal and National parties in the Legislative Council forcing through amendments which the Government felt were contrary to the spirit of the Neave report on prostitution. The Government therefore selectively proclaimed only parts of the act, to minimise the damage done by the upper house.

The general age of consent in Victoria was lowered to 16 in 1991 with the passage of the *Crimes (Sexual Offences) Act 1991*.⁴³ This act repealed the prohibition on engaging in sex with virgins aged 16 or above but under 18, except in circumstances where the young person is under the care, supervision or authority of another.⁴⁴ Section 48 (2) provided a defence to a person charged with having sex with a person aged 16 or 17 who was under their care, supervision or authority if the accused believed on reasonable grounds that the other person was aged 18 or older. The 1991 act also retained the defences for engaging in sex with persons of or above the age of 10 and under 16.⁴⁵

⁴³ *Crimes (Sexual Offences) Act 1991* (Vic) No. 8 of 1991

⁴⁴ *Ibid* s. 48 (1)

⁴⁵ *Ibid* s. 46 (2)

WESTERN AUSTRALIA

It was not until December 1989, after four unsuccessful attempts, that the Western Australian Parliament passed legislation which changed the law relating to sexual acts between males. The *Law Reform (Decriminalisation of Sodomy) Act 1989* was proclaimed (i.e. came into effect) in March 1990, but despite these changes homosexuals were not treated equally with heterosexuals. Indeed an examination of the previous four attempts at law reform shows that the 1989 reform was the most restrictive of all.

On 30 November 1973 the Attorney-General in the Tonkin Labor Government introduced a bill that was very similar to South Australia's first reform in 1972. Sexual acts between males were to remain crimes, with the penalties and archaic language left intact ("carnal knowledge against the order of nature"), but it would be a defence if they were committed in private by consenting persons over the age of 18 years. After lengthy debate the bill was defeated in the Legislative Council on 14 December 1973, and a Royal Commission was appointed to make further inquiry into the issue.⁴⁶

The Royal Commission of 1974 was restricted from the beginning by narrow terms of reference, which empowered it to examine only the offences and punishments relating to acts of buggery (anal intercourse) and acts of gross indecency (not defined in statutes but generally referring to oral sex and mutual masturbation) and "to make recommendations as to the re-wording in more precise terms of the offences outlined in those sections".⁴⁷ The six members of the Commission, all members of parliament without specialised knowledge of the subject, were thus confined to changing the terminology of the existing criminal code, without suggesting alterations to the substantive law. The Commission heard evidence from doctors, lawyers, psychiatrists, psychologists, teachers, ministers of religion, police officers, social workers and homosexual organisations and individuals. In their final report they commended the English reform of 1967, and recommended that Western Australia's laws against buggery and gross indecency should no longer be offences if performed between consenting parties over the age of 18 years. They also recommended that the words "carnal knowledge against the order of nature" should be replaced by "carnal knowledge per anum". Speaking beyond their terms of reference, the Commission also suggested that the law should apply equally to soliciting for homosexual and heterosexual purposes.⁴⁸ However no subsequent steps were taken by Government to implement its recommendations.

The second attempt to decriminalise sexual acts between males was in 1977 when Grace Vaughan, a Labor member of the Legislative Council, introduced a private member's bill. The "Vaughan Bill" advocated an age of consent of

⁴⁶ Heather McRae, "Homosexuality and the law", PhD thesis, Monash University, 1978, p. 319. See also, Clohesy, Mike, "Homosexuality Commission of the WA Government", *Camp Ink*, Vol. 4 Nos 3&4, pp. 24-25.

⁴⁷ Report of the Honorary Royal Commission Appointed to Inquire and Report upon Matters Relating to Homosexuality in Western Australia, (1974), p. 24.

⁴⁸ McRae, Heather, op cit., pp. 320-323

16, the same as for heterosexual sex.⁴⁹ The bill was passed in the Legislative Council in October 1977, but was defeated in the Legislative Assembly. A conscience vote was allowed and although most members of the Labor Opposition supported the bill only 9 Liberal and National Party members voted in favour.⁵⁰

Another attempt was made in 1984 when the Labor Government allowed one of its backbenchers, Bob Hetherington, a member of the Legislative Council, to introduce a private member's bill. The fact that the bill was introduced as a private member's bill, and not as a government bill, caused gay activists to doubt the government's commitment to homosexual law reform.⁵¹ When it was announced that the government had decided on an age of consent of 18 for homosexual sexual conduct, male or female, compared with 16 for heterosexual conduct, gay activists refused to support the proposed changes and actively campaigned to defeat the bill.⁵² The Law Reform Sub-committee of CAMP WA (Campaign Against Moral Persecution), the main gay activist group in Perth at the time, justified its opposition to the bill by saying:

*A discriminatory age of consent is not only not a good thing, it is a wholly bad thing. In view of the overwhelming proportion of gay men who accept their sexuality by about age fifteen, an age of consent set at eighteen disallows these people any sexual expression for several years, under penalty of two to five years gaol. It is quite unacceptable for young gay males to have special laws controlling their lives when their heterosexual peers have no such restrictions. It is one thing to allow old laws to remain on the statute book, but it is an altogether different matter when a Parliament passes laws re-affirming ignorance and prejudice in these matters.*⁵³

Had the 1984 law reform proposal been successful it would have created a three tiered age of consent for sexual conduct: 16 years for heterosexual sexual conduct: 17 years for a female where the partner was a teacher or guardian: and 18 years for homosexual sexual conduct. Despite having the support of the Opposition leader, Bill Hassell, one of only three Liberals to support the 1977 bill, the 1984 proposal was narrowly defeated in the Legislative Council.⁵⁴

Hetherington introduced another private member's bill in the Legislative Council in 1987, again with the support of the Labor Government. This bill was defeated along party lines 14-13. Hetherington believed that decriminalising homosexual acts would encourage men who had sex with other men to be tested for HIV and this would help in the fight against the spread of AIDS. Hetherington attempted to counter the predicable, and well-worn, criticisms of homosexual law reform from well organised

⁴⁹ "Should homosexuality be decriminalised?", *Daily News*, Perth, 19 September 1977, p. 8.

⁵⁰ "3 votes axe W.A. Bill!", *Campaign*, No. 27, December 1977, p. 3

⁵¹ Dunbar, Roy, "Law reform for Perth", *Campaign*, No. 100, April 1984 p. 10. See also "In Western Australia all people are equal but straights are more equal than gays", *Campaign* No. 101, May 1984, p. 5.

⁵² "CAMP - WA answers the critics", *Campaign*, No. 103, July 1984, p. 6.

⁵³ "Law reform bulletin", *The West Campaigner*, May 1984, pp. 5-6.

⁵⁴ "Law reform fails again in WA", *OutRage*, No. 14, June 1984 p. 7

fundamentalist Christian groups in Western Australia by focussing on the public health benefits of the bill. He also emphasised that it was not the bill's intention to condone homosexual practices or promote homosexuality as an acceptable alternative lifestyle. Like Hetherington's previous bill the 1987 bill also had an age of consent of 18 for homosexual sexual conduct.⁵⁵

The persistence of Labor members of the Legislative Council was evident again in 1989 when backbencher, John Halden, introduced yet another homosexual law reform bill. This bill, the *Law Reform (Decriminalisation of Sodomy) Bill*,⁵⁶ was passed by the Western Australia Parliament on 7 December 1989. The Act, which was proclaimed in March 1990, fell far short of what homosexual activists had been lobbying for. While the heterosexual age of consent was 16, this Act imposed an age of consent of 21 for sexual acts in private between consenting males, and also created new homosexual offences. In addition the Act contained a Preamble which clearly stated Parliament's disapproval of homosexuality. The Preamble read:

WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law;

AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;

AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;

AND WHEREAS, the Parliament does not by its act in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour;

AND WHEREAS, in particular the Parliament disapproves of persons with care supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the State so doing;...

Apart from the discriminatory age of consent (heterosexual age of consent is 16), the Act created a new crime whereby it was an offence for a person "... to promote or encourage homosexual behaviour as part of the teaching in any primary or secondary educational institution."⁵⁷ The effect of this provision was to impose restrictions on the sort of information schools and teachers could provide to students about homosexuality. The legislation did not define what the terms "encourage" or "promote" homosexuality mean, so it was left to the courts to interpret them. The act also contained a provision which stated that: "It is contrary to public policy to encourage or promote homosexual behaviour and the encouragement or promotion of homosexual behaviour shall not be capable of being a public purpose."⁵⁸

The bill, as introduced by Halden, had an age of consent of 18, not 21, and did not create a new offence of promoting or encouraging homosexual behaviour

⁵⁵ 'One vote stops WA law reform', *OutRage*, No. 51, August 1987 p. 11.

⁵⁶ After receiving the royal assent this bill became the *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA) No.32 of 1989

⁵⁷ *Ibid.* s. 24.

⁵⁸ *Ibid.* s. 23.

as part of teaching in any primary or secondary institution. These amendments were imposed on the government by the Liberal Opposition as a trade-off for the Opposition not voting against the legislation. The proposer of the amendments, Peter Foss, a Liberal member of the Legislative Assembly, justified the age of consent of 21 for homosexual sexual conduct on the ground that it would protect people who were capable of responding both homosexually and heterosexually from "being pushed too early into responding homosexually when they have the opportunity of responding heterosexually."⁵⁹

A public meeting of homosexuals in November 1989 voted overwhelmingly not to campaign against the proposed changes despite the unequal age of consent and the limitations on disseminating information about homosexuality.

Despite the on-going refusal of the Western Australian Government to lower the age of consent for homosexual sex, it was effectively reduced to 18 following the passage of the *Human Rights (Sexual Conduct) Act* (Cwth)⁶⁰ in 1994. This act was passed by the Commonwealth Parliament following the decision of the United Nations Human Rights Committee to uphold a complaint from Tasmanian gay activist, Nick Toonen, that Tasmania's anti-homosexual laws were in breach of his rights under the International Covenant on Civil and Political Rights. Section 4 of the *Human Rights (Sexual Conduct) Act* says:

- (1) *Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth a State or Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.*
- (2) *For the purpose of this section, an adult is a person who is 18 years old or more.*

Commonwealth legislation applies to the whole of Australia, and in circumstances where provisions of a Commonwealth act conflict with provisions of a State act (on a matter that both have the power to legislate), the law of the Commonwealth prevails to the extent of any inconsistency. Therefore, the age of consent of 21 for homosexual sex imposed by the Western Australian *Criminal Code Compilation Act 1913*,⁶¹ was invalidated by section 4 of the *Human Rights (Sexual Conduct) Act*.

Equal age of consent was formally achieved in Western Australia in 2002 when the Western Australian Parliament passed the *Acts Amendment (Lesbian and Gay Law Reform) Act 2002*.⁶² This act also repealed the offence of promoting or encouraging homosexual behaviour as part of teaching in any primary or secondary education institution, which was a new offence created when the *Law Reform (Decriminalisation of Sodomy) Act 1989* was enacted.

⁵⁹ "The Foss amendments", *Westside Observer*, Vol 3 No. 5, December 1989, p. 8.

⁶⁰ *Human Rights (Sexual Conduct) Act 1994* (Cwth), No. 179 of 1994

⁶¹ As amended by the *Law Reform (Decriminalisation of Sodomy) Act 1989* (W.A.) No. 32 of 1989

⁶² *Acts Amendment (Lesbian and Gay Law Reform) Act 2002* (W.A.), No. 3 of 2002

The Act also provides a defence to a charge of engaging in a sexual act with a person of or over 13 and under 16 where the accused believed on reasonable grounds that the other person was of or over the age of 16, but it is only available to people not more than 3 years older than the other person.⁶³ It is an offence for a person in a position of care, supervision or authority over another person to engage in acts of a sexual nature with that person if they are under the age of 18.⁶⁴

⁶³ Ibid s. 38. Now incorporated into the *Criminal Code Compilation Act 1913*, s. 321

⁶⁴ Ibid s. 40. Now incorporated into the *Criminal Code Compilation Act 1913*, s. 322

QUEENSLAND

The 1970s and 1980s, which saw homosexual law reform achieved in most parts of Australia, coincided with the reign of Joe Bjelke-Petersen as Premier of Queensland. Through his domination of the Government, Bjelke-Petersen was able to impose his fundamentalist Christian morality on Queenslanders. This resulted in homosexuals in Queensland being persecuted even more vigorously than before, while at the same time, the legal position of homosexuals in most other parts of Australia was improving.

It should come as no surprise that in such a political climate few homosexuals in Queensland had the courage to publicly declare their sexuality. One person who did, and who suffered greatly because of it, was Greg Weir. In 1976 Greg Weir was a student at Kelvin Grove Teachers' College in Brisbane. He "came out" in the student newspaper when he set up a gay group on campus. As a result the Queensland Government refused to employ him when he graduated as a teacher even though he was bonded to the Education Department. There was a great deal of publicity about Greg Weir's case throughout Australia⁶⁵ and a national Greg Weir Defence Campaign was established to fight the government's decision, supported by the Australian Union of Students.⁶⁶ Although Weir sued the Queensland Government, they managed to drag the case out to the point where Weir and his supporters could not afford to continue. Greg Weir never did become a teacher in Queensland.

During 1985 there was a lot of speculation in the media that the incidence of child pornography and sexual abuse of children in Queensland was increasing. Homosexuals, who had long been branded "child molesters" and "perverts" by members of the Government and their supporters, again came under concerted attack. In November 1985 the Government responded in an extraordinary way by passing legislation amending the Liquor Act. The new law made it an offence for a publican to serve liquor to, or to allow to remain on licensed premises, "perverts, deviants, child molesters and drug users." The legislation was widely criticised as being vague and unworkable and the Queensland Hotels Association advised publicans to ignore the legislation.⁶⁷ How a publican was supposed to identify someone who fitted any of those categories, or how refusing them access to hotels was supposed to reduce the incidence of child sexual abuse was never explained and remains a mystery. This legislation was yet another example of the ways in which homosexuals in Queensland were discriminated by the law.

The criminal laws which prohibited sexual acts between males were regularly, and often enthusiastically, enforced by the Queensland Police Force. Occasionally the media picked up on police practices, however it was not until the late 1980s that criticism of police harassment of males who had sex with

⁶⁵ Roberts, Ashley, "Melbourne Greg Weir demo largest in four years", *Campaign*, No. 20, May, 1977, p. 3.

⁶⁶ "Let Greg Teach", *Camp Ink*, No. 40, March 1977, pp. 12-13. For an index of Greg Weir's papers deposited with National Library Australia see <http://nla.gov.au/nla.ms-ms8915>. A copy of Greg Weir's papers is also held by the Australian Lesbian & Gay Archives.

⁶⁷ "Pubs snub new law", *Daily Sun*, Brisbane, 22 November 1985, p. 1.

other males became more frequent. In one case, two men were arrested at Southport in January 1988, and charged with engaging in "indecent practices between males" after police visited their home following an anonymous tip-off. While at the home the police found some gay magazines and questioned them about their relationship. They admitted being in a homosexual relationship as they mistakenly believed their private sexual activities were not against the law. While some people questioned whether police should concern themselves with private sexual activities the case only received passing comment in the media.⁶⁸

However, an incident in the western Queensland town of Roma in April 1989, received much wider publicity. It also provided a focal point for Queensland's first major demonstration in support of homosexual law reform when, on 31 August 1989, several hundred people demonstrated outside Parliament House in Brisbane.⁶⁹ The incident involved five men who were arrested and charged with homosexual offences such as "gross indecency" (oral sex and/or masturbation) and "committing carnal knowledge against the order of nature" (anal intercourse). Like the earlier case, these charges related to consensual sexual conduct in private. Police began to suspect that one of the men might be a homosexual while questioning him about a completely unrelated matter. When asked by police the man admitted he was living in a homosexual relationship with another man. Both men were charged as were another three men who were identified from diaries and photographs seized from the first two men arrested.⁷⁰

When asked to comment on the Roma arrests the Police Minister, Russell Cooper, denied that police were harassing homosexuals and responded to calls for law reform by saying: "It is very much against the law here and there is no way in the world we will be softening our attitude."⁷¹

Mr Cooper's comments not only reflected the government line but were meant to reassure the public of the Government's commitment to preserving "law and order" in the run up to the State election which was held in early December 1989.

Not all anti-gay prejudice in Queensland came from direct government action. In August 1989 the Queensland State Library shredded two books of photographs, some of which were homo-erotic, by well known American photographer Robert Mapplethorpe,⁷² who was homosexual. This incident serves to illustrate the institutionalised climate of fear that the issue of homosexuality created in Queensland. People who might not have any personal prejudice against homosexuals felt compelled, through fear of government retribution, to remove themselves from suspicion of being supportive of the rights of homosexuals.

In October 1989, during the Queensland election campaign, *The Bulletin* magazine published the result of an opinion poll which showed that while

⁶⁸ "Sex in private prosecuted in Queensland", *Gayzette*, Melbourne, No. 48, March 1988, p. 1.

⁶⁹ "Gays march for reform of Qld laws", *The Age*, Melbourne, 1 September 1989, p. 6.

⁷⁰ "Police arrest five on homosexual counts", *Sunday Mail*, Brisbane, 6 August 1989, p. 1.

⁷¹ "Homosexuality never to be tolerated: Govt", *Courier Mail*, Brisbane, 7 August 1989.

⁷² "Qld library accused of censorship", *Canberra Times*, 12 August 1989.

most Queenslanders did not agree that homosexuals should be treated equally to heterosexuals, they did support the decriminalisation of homosexual sexual conduct between consenting adults.⁷³ Despite this evidence of a change in public opinion, the Queensland Government continued to reject any change in its policy towards homosexuals and continued to refer to homosexuals as "sexual deviants".

The election, which was held on 2 December 1989, saw a Labor Government elected in Queensland for the first time in 32 years. Shortly after the election the new Premier, Wayne Goss, announced that the Criminal Justice Commission (CJC) would conduct a review of the State's laws relating to homosexuality.

In October 1990 the CJC recommended that all references to specific homosexual offences be removed from the Criminal Code and that the age of consent for homosexual sexual conduct be 16, the same as for heterosexual sexual conduct. These recommendations were accepted by the Queensland Parliament and incorporated in the *Criminal Code and Another Act Amendment Act 1990*⁷⁴ which was passed on 29 November 1990.⁷⁵ However, the act imposed a higher age of consent of 18 for people engaging in anal intercourse (homosexual or heterosexual), and the following comments provide an interesting analysis of how this came about:

"...the Act illustrates the pragmatic political response of the Goss Labor Government in relation to potentially unpalatable legislation. Instead of merely making the age of consent, whether in a homosexual or heterosexual context, 16 years of age, the Government chose a politically expedient option. The legislation makes the age of consent, whether for homosexuals or heterosexuals, 16 years of age except for the act of sodomy. To attempt or to successfully perform anal intercourse, the law in Queensland states that a person must be 18 years of age regardless of sexual preference. It is clear from reading submissions made to the Criminal Justice Commission and subsequently to the Criminal Justice Committee, that religious lobby groups constantly correlate homosexual activity and sodomy and their moral and legal objections flow from that basic proposition. Accordingly it is reasonably safe to suggest that the Government appeased the Fundamentalists by making it appear as though the age of consent for homosexual men is 18 whilst it is 16 for heterosexuals. This of course is incorrect but, as evidenced by the fact that both local and southern media have misreported the legislation as enacting a discriminatory age of consent on the basis of sexual orientation rather than a specific act of anal intercourse, the tactic has been successful."⁷⁶

The act provides a defence to a charge of engaging in an act of a sexual nature, other than anal intercourse, with a person aged between 12 and 16 if the accused believed on reasonable grounds that the other person was of or

⁷³ "Glad to be Gay", *The Bulletin*, 10 October 1989.

⁷⁴ The *Criminal Code and Another Act Amendment Act 1990*, (Qld), No. 93 of 1990 amended the principal act, the *Criminal Code Act 1899* (Qld)

⁷⁵ For a succinct summary of the events leading to the passing of homosexual law reform following the election of the Goss Labor Government, see "Count down to law reform", *Queensland Pride*, No. 1, January - February 1991.

⁷⁶ Patterson, C. "Queensland - Years of Change", *Australian Gay and Lesbian Law Review*, Vol. 1, Autumn 1992, p. 88

above 16. In relation to anal intercourse it is a defence to a charge of engaging in anal intercourse with a person between the ages of 12 and 18 if the accused believed on reasonable grounds that the other person was of or above 18.⁷⁷

⁷⁷ *Criminal Code Act 1899* (Qld), s.210 (5) and s. 208 (3).

AUSTRALIAN CAPITAL TERRITORY

The Australian Capital Territory Homosexual Law Reform Society was formed in July 1969 following public concern about the way police treated homosexuals in Canberra. It is interesting to note that this was not a gay group. The idea came from two men who were civil libertarians and not gay, but who were concerned about the injustice of the treatment of homosexuals. They were moved to act following publication of an article in the *Canberra Times* about two men who had been charged with indecent assault for having consensual sex in a car.⁷⁸ The group lobbied politicians and church leaders and wrote letters to newspapers seeking support for the repeal of the Territory's homosexual laws.

Not much happened until October 1973 when a motion supporting homosexual law reform, sponsored by Dr Moss Cass (Labor) and John Gorton (Liberal), was passed in the House of Representatives by 64 votes to 40.⁷⁹ The motion said:

...that in the opinion of this House homosexual acts between consenting adults in private should not be subject to the criminal law.

At this time the ACT did not have self-government⁸⁰. It had an Advisory Council, but all laws governing the Territory were passed by the Commonwealth Parliament.

No action was taken on this resolution until May 1975 when the ACT Legislative Assembly passed an ordinance which decriminalised some sexual conduct between males. The ordinance was sent to the Attorney-General for approval but was still being considered when the Whitlam Labor Government was dismissed in November 1975.

The 1975 ordinance was not supported by homosexual activists as it contained a higher age of consent for homosexual sexual acts of 18 compared with 16 for heterosexual sexual acts, it also retained the draconian penalty of a minimum of five years and a maximum of life imprisonment for buggery (anal intercourse). This created the possibility of a homosexual man, if convicted of engaging in consensual anal intercourse in a public place, being severely punished whereas heterosexual intercourse in a public place would be punished by a maximum penalty of two months imprisonment or a fine of \$10 on a charge of indecent behaviour.

Despite criticism from homosexual activists and others the provisions of the 1975 ordinance were accepted by the Attorney-General in the Fraser Liberal Government, Bob Ellicott, and became law when he signed the Law Reform (Sexual Behaviour) Ordinance 1976⁸¹ in November 1976. Thus the ACT

⁷⁸ Willett, Graham, *Living out loud: a history of gay and lesbian activism in Australia*, St Leonards, NSW, Allen & Unwin, 2000, pp. 28-30.

⁷⁹ Watson, Lex, 'Please sir, we'd like some more', *Camp Ink*, Vol. 3, No. 7, p. 3.

⁸⁰ Self-government in the Australian Capital Territory was established in 1988 under the *Australian Capital Territory (Self-Government) Act 1988*

⁸¹ *Law Reform (Sexual Behaviour) Ordinance 1976 (ACT)*, No. 55 of 1976

Legislative Assembly became the second parliament in Australia to pass homosexual law reform legislation.

The age of consent for homosexual sexual acts was lowered to 16, the same as for heterosexual acts, on 12 December 1985 when the Governor-General gave the royal assent to the Crimes (Amendment) Ordinance No. 5.⁸² The ordinance also provided two defences to people charged with having sex with a person who was of or above the age of 10, but under 16. One defence is where the accused is no more than 2 years older than the younger person, and the second, is where the accused believed on reasonable grounds that the other person was of or above the age of 16.⁸³

⁸² *Crimes (Amendment) Ordinance (No. 5) 1985* (ACT), No. 62 of 1985. This ordinance amended Part IIIa of the principal act which is the *Crimes Act 1900* of the State of New South Wales in its application to the Australian Capital Territory.

⁸³ These defences have been incorporated in the *Crimes Act 1900* of the State of New South Wales in its application to the Australian Capital Territory, s.55 (3) and s.61 (3).

NEW SOUTH WALES

Whilst Sydney was the birthplace of nation-wide homosexual rights activism through the Campaign Against Moral Persecution in September 1970, it was not until the 1980s that the activism bore legislative fruit in NSW.

The first legal changes towards equal treatment for homosexuals under the law in New South Wales came, not in the area of reform of the criminal law, as in other States, but in the form of an amendment to the Anti-Discrimination Act. The act was amended in 1982, by the Wran Government in its sixth year of office, making it unlawful to discriminate against a person on the ground of their homosexuality in a number of areas, such as employment, education, provision of goods and services, accommodation and registered clubs.

It was not until 1984 that the Crimes Act in New South Wales was amended to decriminalise sexual conduct between consenting adult males. This created the absurd possibility that, between 1982 and 1984, a person could be prosecuted for engaging in consensual homosexual sex with an adult male in private, yet be protected from being discriminated against by his employer should the employer become aware of the prosecution.

The first legislative attempt at reform of the anti-homosexual laws in New South Wales criminal law occurred in 1978 when John Dowd, a Liberal member of the Legislative Assembly, attempted to introduce a private member's bill. Dowd's bill was never introduced into parliament as the Labor Government voted against it being included on the parliamentary notice paper.

The catalyst for homosexual law reform in New South Wales was an unintended consequence that flowed from Premier Wran's decision to change the state's rape laws and express them in gender neutral terms. A part of the new law was inconsistent with an existing section in the *Crimes Act* relating to homosexual intercourse. It was the creation of this anomaly that led to a political campaign whose aim was the repeal of all anti-homosexual laws in the *Crimes Act*.

The changes to the rape laws were included in the *Crimes (Sexual Assault) Amendment Act 1981* as part of Wran's pro-woman agenda, and consisted of abolishing the crime of rape and replacing it with four new offences of sexual assault where the emphasis was on the violence associated with a sexual assault rather than the sexual aspect of the assault, and the offences were gender neutral.

The problem was that under the *Crimes Act* a male convicted of engaging in homosexual intercourse (consent was irrelevant) was liable to imprisonment for up to 14 years, whereas under the new law the maximum penalty for engaging in non-consensual intercourse was 7 years imprisonment. And because the new law was not gender specific it applied to homosexuals and heterosexuals. The absurd situation arose that a male could be imprisoned for up to 14 years for engaging in consensual homosexual intercourse under one section, and under another section only 7 years for engaging in non-consensual homosexual intercourse.

In late 1980 Lex Watson and Craig Johnston, two prominent gay activists, had established the Gay Rights Lobby (GRL). Both Watson and Johnston were well connected within the parliamentary and organisational wings of the New South Wales Labor Party, and through contacts became aware of the proposed changes to the rape laws before they were introduced into parliament. They quickly recognised the anomaly and noted that it would only be removed if the homosexual offences in the *Crimes Act* were repealed. Watson worked closely with George Petersen, a Labor member of the Legislative Assembly, to draft amendments and gain parliamentary support. Watson claims that Wran was aware of the anomaly caused by the use of gender neutral language in the bill, but took the view that as an election was due later that year the Government would suffer greater electoral damage if it repealed the homosexual laws than it would by ignoring the pressure from gay activists.⁸⁴

In March 1981, at the committee stage of the *Crimes (Sexual Assault) Amendment Bill* in the Legislative Assembly, George Petersen attempted to introduce an amendment to the bill which would have repealed all the anti-homosexual offences contained in the *Crimes Act*. Petersen's amendment was supported by the Gay Rights Lobby which mobilised support within the homosexual community.⁸⁵ It was publicly supported by the Attorney-General, Frank Walker, and youth groups within the ALP, and public opinion polls showed that a majority of people favoured homosexual law reform.⁸⁶ Despite this support Petersen's amendment was doomed to fail because it was against Labor Party rules for a member to attempt to amend a Government bill. Also, there was little support for homosexual law reform from within the parliamentary Labor Party. Most members were ignorant of homosexual issues and the Catholic Right, which controlled the New South Wales Labor Party, was opposed to homosexual law reform. The extent of this opposition was made apparent when the Chair of Committees refused to allow the Petersen amendment to be debated by ruling it out of order. Petersen could have challenged the Chair's ruling but decided against it after being threatened with expulsion from the ALP if he did so.⁸⁷

At the State election in September 1981 the Wran Labor Government was returned with a majority in both Houses of Parliament. In November George Petersen succeeded in introducing a private members bill in the Legislative Assembly to remove all anti-homosexual offences from the criminal law and provide an equal age of consent of 16 for both heterosexual and homosexual sexual conduct. The Standing Orders of the New South Wales Parliament did not provide an opportunity for members to introduce private member's bills. A private member's bill could only be introduced if the government agreed to suspend Standing Orders to allow such a bill to be introduced. Petersen's

⁸⁴ McLachlan, M, *Poofters & politicians – strange bedfellows? The achievement of homosexual law reform in New South Wales*, thesis submitted for a Masters Degree, University of New England, November 1998 p. 26.

⁸⁵ *Campaign*, No. 63, March 1981, p. 10.

⁸⁶ Raymond, Leigh, "Homosexuals: the MPs won't vote", *Gay Community News* (Melbourne), Vol 3 No. 4, pp. 7-8.

⁸⁷ McLachlan, Murray, *op cit.*, p. 26

private member's bill was the first time in 60 years that the Government had voted to allow a private member's bill to be introduced.⁸⁸

After the bill had its first reading the debate was adjourned. This allowed opponents of law reform to begin a campaign which led to the defeat of the bill at its second reading. When the debate resumed it quickly degenerated into chaos as a record number of members chose to speak. It was party policy in the New South Wales Labor Party that issues around homosexual law reform (and abortion) were to be resolved by a conscience vote, rather than members of parliament being directed by the party how to vote. When it came to a vote on Petersen's bill all members of the Liberal and Country (now known as the National Party) Parties voted as a bloc against it, and more than half the Labor members voted with the Opposition. The result was that the bill was overwhelmingly defeated at the second reading by 67 votes to 28.⁸⁹

Another private member's bill was introduced in the Legislative Assembly immediately after the Petersen bill was defeated. This bill, sponsored by Michael Egan, a Labor member of the Legislative Assembly, adopted a totally different approach to Petersen, and was said to have been prepared at the urging of Premier Wran and had support within the Labor Caucus.⁹⁰ It did not decriminalise the anti-homosexual offences in the Crimes Act; it merely provided a defence if an accused could prove at his trial, that the parties to the offence were adults and the offence was committed in private⁹¹. The Egan bill, like the Petersen bill, was defeated at the second reading.

Following this defeat the Labor Government was widely criticised for lacking the courage to implement party policy which called for the decriminalisation of sexual acts between consenting adult males. In an attempt to counter this criticism Barrie Unsworth, MLC, a leading figure in the Catholic right wing of the New South Wales Labor Party, introduced the *Crimes (Homosexual Behaviour) Amendment Bill* into the Legislative Council in February 1982. This bill was intended to liberalise the laws relating to homosexuality but not to repeal them.

The purpose of the Unsworth bill was to give the appearance of reforming the law without offending the moral values of the Catholic right of the Labor Party. This was made clear in the second reading speech when Unsworth said there must be: "a clear distinction between crime and sin...any punishment that such individuals receive will be administered by God, in this life and the next."⁹² His justification for retaining the offence of buggery was "to retain a sanction against certain elements of homosexual practice."⁹³ It is not surprising then that gay activists and supporters of equality law reform organised to oppose the Unsworth Bill which they described as a "sham". Lex Watson, who knew Unsworth well, rejects the suggestion that Unsworth was anti-gay and describes his motives as follows: "He was a political realist and was

⁸⁸ Email to the writer from Lex Watson, 15 May 2010.

⁸⁹ "NSW Parliament loses nerve over law reform", *Campaign*, No. 73, January 1982, pp. 5-6.

⁹⁰ McLachlan, Murray, op cit., p.30.

⁹¹ Ibid, p. 30. The bill was titled: *Crimes (Adult Sexual Behaviour) Amendment Bill 1981*.

⁹² Johnston, Craig, "Back to the 1950s", *Campaign*, No. 75, March 1982, p. 15.

⁹³ Ibid.

trying to do as much as he thought he could get through. He knew that equality was not an option in that parliament...⁹⁴

Not only did Unsworth's bill retain existing anti-homosexual offences it reinforced the discrimination against male homosexuals. For example the age of consent for homosexual sex was to be 18 whereas for heterosexual sex the age of consent is 16; and the bill created a new offence of "gross indecency" between males in public with a penalty of 2 years jail, whereas a similar offence involving heterosexuals had a penalty of a maximum fine of \$200.⁹⁵

The bill was intended to amend the crime of buggery (anal intercourse) by reducing the penalty from 14 years jail to 7 years; while the penalty for attempted buggery was to be reduced from 5 years to 3. The major "reform" in the bill was a provision which said that the homosexual offences mentioned in the bill "shall be deemed not to have been committed" unless it can be established that either i) there was no consent, ii) either party was under 18, or iii) the offence was committed "other than in private".⁹⁶ By retaining homosexual offences the bill would have made it easy for discriminatory enforcement of the law by the police to continue. For example, there would have been nothing to prevent the police from charging an adult male who engaged in consensual sex with another adult male in private, and it would have been of little comfort for the person charged to know that when the case went to court he could have the charge dismissed by showing that both parties were over 18, and consenting, and that the activity took place in private. Also, what about the situation where the person charged could not afford to defend the case? And what about the emotional stress the person would experience knowing he had to appear in court, combined with the fear of publicity arising from the case, even if the charge was dismissed?

When the bill was put to the vote on 16 March 1982, members voted according to their conscience rather than along party lines, as they had done a few months earlier when the Petersen bill was rejected. By a narrow margin, the Unsworth bill was passed by the Legislative Council. Immediately the NSW Homosexual Law Reform Coalition stepped up its lobbying of members of the Legislative Assembly to ensure that the bill was defeated when introduced there.⁹⁷

The bill was defeated in the Legislative Assembly on 1 April 1982 on a conscience vote. Members from the Catholic right of the ALP joined with some members of the Liberal Party and all members of the National Country Party and together they had the numbers to defeat the bill 47 votes to 42.⁹⁸ Although it was recognised by many gay activists that defeat of the Unsworth bill would probably mean that homosexual law reform would be delayed for some time there was widespread agreement within the gay community that

⁹⁴ Email to the writer from Lex Watson, 15 May 2010

⁹⁵ Johnston, Craig, *op cit.*, p. 14

⁹⁶ Johnston, Craig, *op cit.*, p. 14

⁹⁷ Johnston, Craig, *op cit.*, p. 16 See also Carr, Adam, "Sydney gays (almost) united against bill", *Gay Community News* (Melbourne), Vol 4 No. 3, April 1982, pp. 8-9.

⁹⁸ Carr, Adam, "The end of Unsworth", *Gay Community News* (Melbourne), Vol. 4 No. 4, May 1982, p. 9.

anything less than equality with heterosexuals was not acceptable and that it would be better to wait until equality could be achieved.⁹⁹

Why was it that a majority of New South Wales Labor Parliamentarians continued to refuse to support homosexual law reform? Their refusal was all the more difficult to understand when one considers that the Labor Party had just been re-elected with a record majority in the Lower House, and had a workable majority in the Upper House; public opinion supported law reform; it was ALP policy to enact law reform; and equality law reforms had been passed in South Australia and Victoria without any political consequences.

To find the answer we probably have to go back to perhaps the darkest period in the history of the Australian Labor Party - the split of 1954-58 - which almost wrecked the party at both state and federal levels.

At that time, the right-wing Industrial Groups within the Labor Party, which were controlled by B.A. Santamaria's semi-secret Catholic organisation The Movement, were defeated in their attempt to take over the ALP. After a tremendous amount of brawling and bitterness the "groupers" were expelled from the party and formed their own political party, the Democratic Labor Party (DLP), which did much to ensure the defeat of the Labor Party at federal elections, and in the case of Victoria, state elections, for almost the next two decades.

The groupers were most powerful in Victoria where they were supported by the Catholic Archbishop, Dr Daniel Mannix. The effect of the split on the Victorian Labor Party was devastating. The DLP joined forces with the Liberals to defeat the Victorian Labor Government in 1955 and Labor remained in opposition for the next 27 years. As the Labor Party in Victoria began to rebuild it did so without the influence of the conservative Catholic right. The same cannot be said about the Labor Party in New South Wales.

Santamaria and Archbishop Mannix were not able to exert the same influence over the Catholics in the New South Wales Labor Party as they had in Victoria, and the Labor Premier at the time, Joe Cahill, a conservative Catholic, was able to hold the party together and in the end only a few of the groupers were expelled.

The result was that the influence of the Catholic right remained virtually intact and the Catholic Church continued to wield significant power over Labor members of parliament and affect the way they dealt with social and moral issues.¹⁰⁰

Police harassment of gay men continued after the defeat of the Unsworth bill. The Vice Squad, which had a reputation within the gay community for being anti-gay, raided Club 80 in Sydney, a gay male sex club, three times in 1983. A total of 27 men were arrested in the raids and charged with various offences, but most commonly indecent assault on a male, and the rarely used common

⁹⁹ Ibid.

¹⁰⁰ Carr, Adam, "Whatever's the matter with New South Wales?", *Gay Community News*, (Melbourne), Vol. 4 No. 1, February 1982, pp. 7-8.

law offence of engaging in "scandalous conduct". In August 1983 police closed two gay discos for alleged breaches of the licensing laws.¹⁰¹

The anger and resentment felt by homosexuals at the police action in vigorously prosecuting consensual sexual activity between males and the other forms of police harassment, was soon directed at the Government for refusing to act to repeal the anti-homosexual laws which allowed homophobic police to persecute gays.

Homosexual activists used these events to arouse public and media interest in homosexual law reform, in the hope that the Government would be forced to act. Premier Wran was embarrassed when a Gay Rights Embassy was established outside his home in Woollahra for two weeks in September 1983. The "embassy" consisted of a caravan covered in banners and posters which urged people to support law reform and was staffed 24 hours a day.¹⁰²

In a clever move designed to highlight the hypocrisy of police enforcement of the anti-homosexual laws, and embarrass the government, two prominent gay activists, Lex Watson and Robert French, signed statutory declarations admitting that they had engaged in consensual sexual acts with other adult males contrary to the *Crimes Act*. They personally hand delivered their declarations to the head of the Vice Squad and said they expected to be charged. The head of the Vice Squad issued a statement saying he would not take any action. Watson and French then wrote to the Premier pointing out that if they are not prosecuted the charges against the 27 men arrested as a result of the three Club 80 raids should also be dropped.¹⁰³

These actions did not achieve homosexual law reform in 1983, but they demonstrated to the government that homosexuals were becoming better organised and more persistent, and that the issue was not going to go away.

1983 was also the year in which the first openly gay person was elected to local government in New South Wales. In September 1983, Max Pearce, an Independent, was elected to the Woollahra Municipal Council. This was followed in April 1984 at the Sydney City Council elections when three more openly gay candidates, Brian McGahen and Bill Hunt, both Independents, and Craig Johnston, Labor, were elected.

While none of these men were elected solely on a gay rights platform, all of them declared themselves as gay men and announced their intention to promote gay rights.¹⁰⁴

Soon after the state election in March 1984 things began to happen, much to the surprise of everyone. In a speech to the New South Wales Council of Civil Liberties on 6 April 1984, Premier Wran indicated that homosexual law reform was a possibility in the near future. Although Wran's comments were unexpected the Gay Rights Lobby responded quickly and intensified its lobbying of parliamentarians. It sent copies of two of its booklets "Homosexual Law Reform: Questions & Answers" and "Homosexuality:

¹⁰¹ "Biting the bullet on repeal", *Campaign*, No. 94, October 1983, p. 5.

¹⁰² Ibid.

¹⁰³ "Oxford St under siege", *Campaign*, No. 95, November, 1983, p. 5.

¹⁰⁴ "Openly gay candidates elected to Sydney City Council", *Campaign*, No.101, May 1984, p. 5.

Myths and Realities", to all members of parliament to acquaint them with the issues.¹⁰⁵

Then, on 29 April 1984, Premier Wran announced he would introduce a bill into the Legislative Assembly to decriminalise homosexual sexual acts between consenting adults. He also said that this time there would be no conscience vote and he called on the Liberal and National Parties to support the bill.¹⁰⁶ It was the allowing of a conscience vote that had been a major stumbling block to law reform in the past, because it allowed the right-wing Catholics in the Labor Party to combine with conservative Liberal and National Party members; and together they had the numbers to kill any attempt to reform the law.

When the details of the bill became known many gay activists were unhappy with its contents. It was not an equality bill because it had an age of consent of 18 for male homosexual sex compared with an age of consent of 16 for heterosexual sex and for lesbian sex. While the bill removed all reference to offences relating to sex between consenting males over 18, it contained two homosexual offences which applied to situations where one of the males was under 18: they were, gross indecency and homosexual intercourse. The term "gross indecency" was not defined in the bill but included things like mutual masturbation, while the term "homosexual intercourse" was defined as including both anal intercourse and fellatio (oral sex) between males.¹⁰⁷

The lack of an equal age of consent in the bill proved to be quite divisive among gay activists. The whole law reform campaign had been fought on the basis of achieving equality.

A delegation from the Homosexual Law Reform Coalition, the umbrella group which coordinated the efforts of the various groups involved in the law reform campaign, met with Wran and urged him to amend the bill to include an equal age of consent. When Wran made it clear that that was not going to happen, Lex Watson, a member of the delegation, suggested a compromise, the intention of which was to limit the adverse consequences of an unequal age of consent. Watson suggested that Wran "take the model of the incest law" and include a provision in the homosexual law reform bill that required the approval of the Attorney-General before a prosecution could proceed against a person charged with engaging in an act of sexual intercourse or gross indecency with a person aged between 16 and 18. After listening to Watson's suggestion Wran said: "We can do that."¹⁰⁸ However, when the legislation was passed the actual change was less than what the delegation had expected. The approval of the Attorney-General to commence a prosecution was only required in those circumstances where an accused, charged with engaging in an act of sexual intercourse or an act of gross indecency with a person under the age of 18, was also under the age of 18 at the time of the alleged offence.¹⁰⁹ This provision was a marginal improvement only in terms of the equal

¹⁰⁵ Galbraith, Larry, "Law reform free-for-all", *Campaign*, No. 102, June 1984, pp. 5-6.

¹⁰⁶ *Ibid.* p. 14.

¹⁰⁷ *Ibid.* p. 5.

¹⁰⁸ This information was given to the writer in a conversation with Lex Watson on 5 December 2009 at the Australia's Homosexual Histories Conference 9 held at the University of Melbourne, 4-5 December, 2009.

¹⁰⁹ *Crimes (Amendment) Act, 1984 (NSW) Schedule 1 (4) Limitations.*

treatment of 16 and 17 year old homosexuals (their heterosexual equivalents could legally consent to sex with people 16 or over). Interestingly, the legislation included a provision that barred prosecution for the offences of sexual intercourse and attempted sexual intercourse with a person aged between 16 and 18 after the expiration of 12 months from the date of the alleged offence¹¹⁰. There was no similar limitation on prosecutions for gross indecency.

When it became apparent that Wran would not budge on this issue law reform activists were faced with the dilemma of either supporting the bill and compromising one of their basic principles or opposing the bill and risking the whole issue of homosexual law reform being put in the political "too hard basket". As it turned out the Homosexual Law Reform Coalition, the umbrella group which coordinated the efforts of the various groups involved in the law reform campaign, decided to remain neutral, and neither support the bill or oppose it.¹¹¹

Premier Wran referred to the difficulty many homosexuals had in supporting his bill when, during his second reading speech he said:

*"I suppose in a real sense, having regard to the feeling of injustice on the one hand, and indignation, outrage and even prejudice on the other, the bill looked at selfishly might be said to satisfy no one. To my mind, the law cries for reform and the principle inherent in the bill is that sexual activity between consenting males of or over the age of 18 shall be decriminalised. I think it would be an absurdity for the issue of age to be a barrier to reform - I am averting to those who urge that the age of consent for males should be 16 as applies to females. In this House one must try and deal with reality and in my perception the reality is that at this time 18 is acceptable whereas 16 is not"*¹¹²

The *Crimes (Amendment) Act 1984* (NSW)¹¹³ was passed by the New South Wales Parliament on 22 May 1984 and proclaimed on 8 June 1984.

In the years immediately after homosexuality was decriminalised no attempts were made to lower the age of consent to 16. Much of the energy that was put into the law reform campaign either dissipated or was redirected into other issues, such as the fight against AIDS.

The age of consent issue re-emerged in the early 1990s. 'In July 1992 Paul O'Grady (an openly gay member of the Legislative Council) distributed a discussion paper on a proposed bill titled "*Crimes Act (Degenderising of Sexual Offence Provisions) Amendment Bill 1992*". In February 1995 the Gay and Lesbian Rights Lobby circulated a further discussion paper 'The Equal Age of Consent Bill'. In late 1996 it commenced a campaign aimed at amending the *Crimes Act* to provide an equal age of consent, and to remove other inequalities affecting gay men.'¹¹⁴

¹¹⁰ Ibid.

¹¹¹ Galbraith, Larry, op cit., p. 15.

¹¹² Galbraith, Larry, op cit., p.15.

¹¹³ *Crimes (Amendment) Act 1984* (NSW), No. 7 of 1984.

¹¹⁴ McLachlan, Murray, op cit, p. 70.

Throughout much of the 1990s one Labor member of the Legislative Council, Jan Burnswoods, doggedly pursued the age of consent issue, introducing no less than three private members bills.¹¹⁵ One, in 1999, came within one vote of being passed in the Legislative Council.¹¹⁶

In the lead-up to the 2003 New South Wales state election the Gay and Lesbian Rights Lobby was successful in getting the age of consent issue back on the political agenda. The Labor Government indicated that if it won the election it would allow a conscience vote on the issue.

The election was held on 22 March 2003 and the Carr Labor Government was re-elected with an increased majority. In May 2003 the Attorney-General, Bob Debus, introduced the *Crimes Amendment (Sexual Offences) Bill* as a Government sponsored bill, which among other things, lowered the age of consent for homosexual sex to 16, the same as for heterosexual sex.

The Government took the unusual step of saying that it would allow its members a conscience vote on the bill, the first conscience vote on a government sponsored bill since 1984,¹¹⁷ which indicated its less than whole-hearted support for the bill. The Liberal Party also allowed its members a conscience vote, and the National Party urged its members to vote against the bill and almost all did so.¹¹⁸ The bill was passed by 54 votes to 32 in the Legislative Assembly and by 23 votes to 16 in the Legislative Council.¹¹⁹ While most Liberal members of the Legislative Assembly voted against the bill, six, including the leader, John Brogden, supported it. Six Labor members of the Legislative Assembly voted against the bill.¹²⁰ In the Legislative Council, six Liberals voted in favour of the bill and seven against, while four Labor members voted against the bill.¹²¹

As part of the Government's compromise to get support for the bill it agreed to include changes to the *Crimes Act 1900* that were seen as increasing child protection. The bill created two new aggravated sexual assault offences relating to young people with harsher penalties, and removed the defence of reasonable belief as to age. These amendments were an attempt to make it easier for conservative members of parliament, both Labor and Liberal, to support the bill and secure passage of the age of consent provision.¹²² There is an irony in the repeal of the defence of reasonable belief as to age. Section 77 (2) of the *Crimes Act 1900* limited this defence to heterosexuals; it could not be relied upon by males charged with engaging in sex with other males. So, if the point of repealing this defence was a concession to gain support for lowering the age of consent for people who engage in homosexual sex, its effect has been to disadvantage heterosexuals who engage in sex with people

¹¹⁵ Mills, David, "No promises on age of consent", *Sydney Star Observer*, No. 648, 6 February, 2003, p. 3.

¹¹⁶ Mills, David, "Call to action", *Sydney Star Observer*, No. 662, 15 May, 2003, p. 1.

¹¹⁷ Mills, David, "Do the right thing", *Sydney Star Observer*, No. 661, 8 May, 2003, p. 1.

¹¹⁸ "How they voted on age of consent", *Sydney Star Observer*, No. 664, 29 May, 2003, p. 5. See also Mills, David, "Sweet sixteen", *Sydney Star Observer*, No. 663, 22 May, 2003, p. 1.

¹¹⁹ Mills, David, "Sweet sixteen", *Sydney Star Observer*, No. 663, 22 May, 2003, p. 1

¹²⁰ Mills, David, *Ibid.*

¹²¹ *Sydney Star Observer*, No. 664, 29 May, 2003, p. 5.

¹²² Mills, David, "Do the right thing", *Sydney Star Observer*, No. 661, 8 May, 2003, p. 1.

aged under 16, but whom they reasonably believe are of or above the age of 16.¹²³

Despite the repeal of the statutory defence of reasonable belief as to age, the Supreme Court of New South Wales has ruled that the common law defence of reasonable mistake is, in appropriate circumstances, available to people charged with engaging in acts of a sexual nature with people under the age of consent.¹²⁴

The struggle for equality in the criminal law relating to sexual behaviour in New South Wales, which achieved partial success in 1984 with the decriminalisation of homosexual sexual activity between consenting adults, was finally achieved on 13 June 2003 when the *Crimes Amendment (Sexual Offences) Act 2003* was proclaimed.¹²⁵

¹²³ See s. 77 (2) of the *Crimes Act 1900* (NSW) as at May 2003. Repealed by s. 14 of the *Crimes Amendment (Sexual Offences) Act 2003* (NSW), No. 9 of 2003.

¹²⁴ See *Chard v Wallis and another*, (1988) 12 NSWLR 453

¹²⁵ *Crimes Amendment (Sexual Offences) Act 2003* (NSW), No. 9 of 2003, an Act to amend the principal act, the *Crimes Act 1900* (NSW).

TASMANIA

Tasmania was the last state in Australia to repeal its laws that criminalised male homosexual practices between consenting adults in private.

The history of homosexual law reform in Tasmania can be viewed as a two stage process, the first covered the period 1975 to 1980, and the second, from 1988 to 1997.

On 2 November 1975 a petition supporting the recent reform of the law in South Australia was presented to the Royal Commission into Human Relationships when it visited Launceston to take evidence. The petition asked the Royal Commission to recommend all States in Australia adopt similar legislation.¹²⁶

The first organised attempt at homosexual law reform in Tasmania came about with the formation of the Tasmanian Homosexual Law Reform Group (THLRG) in early 1976. The group's first official meeting was held on 10 March 1976¹²⁷ at the Women's Liberation Centre in Launceston, and was attended by 14 people, 7 men and 7 women. On 13 March 1976 an article appeared in the *Examiner* reporting the formation of the group and setting out its aims. The article also included recollections of a man, who attended the meeting, about an experience he went through which expresses powerfully why the group was needed. He said:

*If there had been reform in 1958 I would have been saved from the worst period of my life. I was 21 and living with another man of the same age. The police came to the house and asked who lived there. When we said we did, they asked where we slept and we pointed to the only bed in the house. We were taken to the police station, interviewed and charged with gross indecency. In the Supreme Court I pleaded guilty. I had no legal representation. The case was over in 10 minutes. I got three years...*¹²⁸

Even before the THLRG was formally established activists were using its name to lobby individual politicians, political parties, church leaders, medical associations etc., seeking support for the decriminalisation of sexual conduct in private between consenting adult males. And they were savvy enough to know how to use the press to counter political opposition. In February 1976 when the executive of the Tasmanian ALP attempted to stop discussion on homosexual law reform at its annual State Conference, activists, claiming to represent the THLRG, went to the press and an article appeared in the *Examiner* which embarrassed the ALP¹²⁹

In June 1976 the homosexual law reform campaign received a great boost when Dr Bob Brown, who was well known then in northern Tasmania as a

¹²⁶ "Lton families need help, inquiry finds", *Examiner*, Launceston, 3 November 1975.

¹²⁷ The group was formally established at its second meeting on 29 March 1976 when office bearers were elected.

¹²⁸ "Why Noel shot himself and Bert went to gaol", *Examiner*, Launceston, 13 March 1976, p. 10.

¹²⁹ "Homosexual talk 'stifle' ", *Examiner*, Launceston, 19 February 1976, p. 17.

doctor and conservationist, "came out" publicly as a homosexual in a television interview on the ABC's 'This Day Tonight' programme. During the interview he said:

*I have enough security of mind to be unconcerned about the consequences of lending open support to the homosexual law reform movement.*¹³⁰

Following the publicity given to Bob Brown's "coming out", pressure began to mount on the Government to seriously consider the question of law reform. The Premier, Bill Neilson (Labor), met with the THLRG in October 1976 to discuss the possibility of homosexual law reform. The meeting was arranged following comments made by Michael Tait, then chairman of the State Parliamentary Standing Committee on Legal Matters, that homosexual behaviour between consenting adults in private should not be classified as a criminal offence.¹³¹

However most politicians wanted the homosexual law reform issue to disappear. It was viewed as being political "death". An example of the degree of discomfort felt by many in the Liberal Party can be seen by a decision made by the State Council of the Liberal Party, meeting at Ross on 12 November 1976. The *Examiner*, reporting on the meeting said: "...on a call of voices the meeting decided by a fairly narrow margin not to strongly oppose legalisation of homosexuality."¹³²

The hopes of homosexual activists were raised when, in March 1977, the Tasmanian Labor Government set up a House of Assembly Select Committee to conduct an Inquiry into Victimless Crimes. The terms of reference required the committee to enquire into and report upon: 1) present community attitudes to victimless crime, and 2) any amendment of present legislation that is desirable in the light of these attitudes.

The controversial subject matter of the Inquiry was expected to lead to a lively debate within the community. This was reflected in an editorial in the *Examiner*, on 11 March 1977, which supported the Government's decision to conduct an inquiry into victimless crime, but cautioned that issues such as homosexuality and prostitution "...are still believed to be electoral disaster areas and it takes a brave or foolhardy party leadership to tackle them without testing voter feeling."¹³³

Despite this warning, hopes remained high when shortly after the parliamentary debate on the motion to set up the Committee, a Liberal member for Denison, Mr Baker, indicated that if the committee recommended making homosexual acts between consenting adults legal, it was likely to receive support from the Opposition.¹³⁴

¹³⁰ The television interview was reported in the *Examiner*, Launceston, on 10 June 1976, "Doctor says he's gay". See also Smith, Martin, "Doctor comes out on TV", *Campaign*, No. 11, July 1976, p. 2.

¹³¹ "Group to talk to Neilson on homosexuality", *Examiner*, Launceston, 11 October 1976.

¹³² "Gun laws and homosexuals spark debate", *Examiner*, Launceston, 14 November 1976.

¹³³ "Defining crimes", *Examiner*, Launceston, 11 March 1977 (Editorial).

¹³⁴ "Submissions on law reform", *Examiner*, Launceston, 24 March 1977.

The THLRG made a detailed submission which urged the committee to recognise the injustice of the laws which discriminated against homosexuals and recommended that they be changed. However there were plenty of submissions opposing the decriminalisation of homosexuality. In one such submission the Anglican Bishop of Tasmania, the Rt Reverend R.E. Davies, suggested that rather than repeal the laws against homosexual conduct, it would be preferable to amend the law to allow people who appeared before the courts on homosexual charges to use as a defence the fact that the conduct took place with consent and in private.¹³⁵ Such a suggestion, if accepted, would have continued to subject homosexual men to unjustified stress and expense associated with having to appear in court, and the possibility of publicity, which could lead to public humiliation and discrimination, only to have the charge dismissed by raising the defence that the sexual conduct was done with consent and in private.

When the Committee reported to Parliament it recommended, among other things, that homosexual acts between consenting adults in private be legalised.

It was not until late in 1979 that the Labor Government decided to act on the recommendation of the Parliamentary Select Committee on Victimless Crime. But because of uncertainty about public reaction to the bill, the Government decided against introducing it into Parliament as a Government bill. Instead they allowed the Government Whip, John Green, to introduce a private member's bill into the House of Assembly. In another sign of its nervousness, and lack of commitment to the issue of homosexual law reform, the Government decided to allow a conscience vote rather than direct Labor members to support the bill. The Liberal Opposition also decided to allow its members to vote according to their conscience.¹³⁶

As soon as the bill was introduced there was a flood of letters to newspapers throughout Tasmania protesting against the proposed changes. Even if the bill had passed the Lower House it would have had little chance of being passed by the conservative Upper House.

As it happened the bill lapsed in February 1980 when John Green was defeated in a by-election for his seat in Denison. The by-election was ordered as a result of a scandal over campaign spending.

Not long after John Green lost his seat the Premier, Doug Lowe (Labor), said that the Labor Caucus was not considering the possibility of another private member's bill similar to Green's. It appears the Government went cold on the idea of homosexual law reform for at least two reasons: firstly, the Government was surprised at the hostile public reaction to the bill; and secondly, the result of a state-wide public opinion poll was released while the bill was being debated which showed that 51% of Tasmanians were opposed to legalising homosexual acts between consenting adults.¹³⁷

The law remained unchanged until 1987 when the Tasmanian Liberal Government amended the *Criminal Code Act* to make it "gender neutral". This meant that wherever the words "male" or "female" appeared in the Code

¹³⁵ "Anglicans vote against legal homosexuality", *Examiner*, Launceston, 26 July 1977.

¹³⁶ *Gay Community News* (Melbourne), Vol 1, No. 1, Nov 1979, p. 40.

¹³⁷ *Gay Community News* (Melbourne), Vol 2, No. 3, April 1980, p. 28.

they were removed and replaced by the word "person". However there was one section in the Code which was deliberately not made gender neutral. This was section 123, which made it illegal for males to engage in indecent acts in private or in public ("indecent acts" would cover mutual masturbation).

Bob Brown, who by this time had been elected to the Tasmanian Parliament as an Independent member of the House of Assembly, attempted to use the gender neutral amendment to the *Criminal Code* to achieve at least a partial reform of Tasmania's anti-homosexual laws. He introduced an amendment repealing section 123 by pointing out that retaining it was inconsistent with the Government's purpose of making the *Criminal Code* gender neutral. If the amendment had succeeded it would have meant that the whole of the *Criminal Code* would have been gender neutral and as a spin off, one of the laws which discriminated against homosexuals would have been repealed. Neither the Liberal Government nor the Labor Opposition supported the amendment.

Then, in an attempt to make Section 123 unworkable, Brown suggested that the word "males" in the section should be changed to "persons" so that the Criminal Code would be consistent. His intention was to make the section apply equally to homosexual and heterosexual indecent acts and it would not matter whether they took place in public or in private. If he had succeeded the section would have been unenforceable. However what would probably have happened is that the police would have chosen to enforce the law against homosexuals and ignored equivalent heterosexual conduct. As it turned out the tactic backfired because it was quickly pointed out by the Government and the media that Bob Brown's amendment would have had the effect of making lesbian sexual conduct illegal, for the first time.¹³⁸ Bob Brown withdrew the amendment.

Even if the Brown amendment had succeeded there was another section in the *Criminal Code* which made homosexual conduct illegal. Section 122 said that:

Any person who -

- a) *has sexual intercourse with any person against the order of nature,*
- b) *has sexual intercourse with an animal,*
- c) *consents to a male person having sexual intercourse with him against the order of nature,*

is guilty of a crime.

The old fashioned language used in section 122 a) had been defined by the courts to include both homosexual and heterosexual anal intercourse. While part a) enabled the active participant to be prosecuted, part c) enabled the passive participant (male or female) to be prosecuted.

The Tasmanian Homosexual Law Reform Group had folded after John Green's bill lapsed in 1980, and it was not until April 1988 that homosexual activists again began to organise around the issue of law reform when the

¹³⁸ For reports of Bob Brown's proposed amendment see Lester, Libby, "Lesbian ban looms : new law extended to women", *Launceston Examiner*, 11 July 1987, p. 1; "Brown says amendment was 'misinterpreted'", *Melbourne Star Observer*, No. 48, 17 July 1987, p. 3; and Jaynes, Gary, "Bob Brown's strange amendment", *Gayzette*, No. 40, July 1987, p. 1.

Tasmanian Gay and Lesbian Rights Group (TGLRG) was formed, with branches in Launceston and Hobart.

Public awareness of the activities of the TGLRG began to increase shortly after it began to operate a stall at the Salamanca Market in Hobart on Saturday mornings. The purpose of the stall was to collect signatures on a petition supporting law reform and to distribute information about homosexuality. On 12 September 1988 the Hobart City Council banned the group from having a stall at the market on the ground that it was "inappropriate in a Family Market". The group defied the ban and continued to operate the stall. Police were called and over several week-ends more than 130 arrests were made. It got to the stage where gay and lesbian activists were being arrested merely for wearing a badge or t-shirt which displayed the words "gay" or "lesbian" at the Salamanca Market.

The group remained defiant and organised a series of rallies at Salamanca, which helped make sure the issue received extensive publicity, both in Tasmania and throughout the rest of Australia. There was widespread criticism of the Hobart City Council in the media and in December the ban was lifted.

The TGLRG's strategy for achieving law reform was influenced by the result of a public opinion poll in October 1988 which showed that only 31% of Tasmanians supported homosexual law reform. The group realised that parliamentarians would not act unless, and until, there was clear evidence that public opinion favoured reform. With this in mind the group stepped up its campaign to increase the visibility of homosexuals in Tasmania and destroy many of the myths about homosexuality. The group organised demonstrations; lobbied politicians, church leaders, lawyers and academics; wrote letters and gave interviews to newspapers; appeared on radio and television; and went on numerous public speaking engagements. Within a short time homosexual law reform was a major issue in Tasmanian politics.

Law reform was an issue at the state election, held in May 1989. Following the election the Labor Party became the government with the support of the Green Independents (conservationists). As part of the deal struck between the two parties (the Accord) the Labor Government promised to introduce homosexual law reform.

The conservative forces began to organise to defeat any parliamentary move to decriminalise homosexuality. Two anti-gay groups formed in June 1989; they were: For A Caring Tasmania (FACT), and Concerned Residents Against Moral Pollution (CRAMP). These groups were involved in organising meetings and rallies throughout Tasmania (particularly in northern towns) with the aim of stirring up anti-gay prejudice in an attempt to destabilise the Labor-Green Accord.

Despite the efforts of those opposed to homosexual law reform an opinion poll published in October 1989 showed that support for law reform had increased from 31% in October 1988 to 43%.¹³⁹

¹³⁹ "Poll findings boost State activists' campaign", *Sunday Tasmanian*, 1 October 1989.

The opinion poll result encouraged the TGLRG to step up its efforts. They applied pressure to get the Labor Government to introduce law reform by lobbying local ALP branches, unions and community groups. In a courageous display of direct action, homosexual activists, and their heterosexual supporters, also attended meetings organised by anti-gay groups where they were subjected to verbal abuse and shouted down when they attempted to address meetings.

The Tasmanian Government decided to attempt to decriminalise homosexuality as part of its HIV/AIDS strategy which was released in June 1990. The Government argued that male homosexuals, as a high risk group, would be less likely to come forward to seek information and/or counselling about HIV/AIDS, or be tested for HIV, while homosexual acts remained illegal. The Government went to great lengths to assure conservative sections of the community that its support for law reform was on public health grounds and that its action should not be seen as approving of homosexual practices. Indeed, when the draft legislation was prepared it contained a Preamble which, in part, stated:

Whereas, the Parliament believes that HIV/AIDS prevention is best served by support for marriage and stable family, community and personal relationships, and is least served by heterosexual and homosexual promiscuity;

*And whereas, while the Parliament believes that criminal penalties should not apply for sexual intercourse between persons of the same sex, it does not endorse such behaviour, or condone attempts to promote the conduct of such behaviour...*¹⁴⁰

Homosexual activists immediately attacked the wording of the Preamble as being offensive and unnecessary. They argued that it would reinforce prejudice and discrimination against homosexual people. Their demand was for equality legislation. They urged the Government to introduce a separate bill to decriminalise homosexuality and not use "the back-door" approach by including law reform as part of a public health strategy.

In October 1990, after several months of inaction by the Government, a private member's bill was introduced into the House of Assembly by the Green Independent, Rev. Lance Armstrong, at the request of the Tasmanian Gay and Lesbian Rights Group. The Armstrong bill called for the repeal of sections 122 (a) and (c), and Section 123 of the *Criminal Code* which related to homosexual offences. If passed, this bill would have meant that, in law, homosexual sexual practices would have been treated in the same way as heterosexual sexual practices.

Finally, in December 1990 the Government introduced the *HIV/AIDS Preventive Measures Bill* in the House of Assembly. The bill included the decriminalisation of homosexuality and set an equal age of consent with heterosexual conduct. To the surprise of many, the Preamble included in the draft bill, which stated the Parliament did not approve of homosexuality, had been deleted. Although support for homosexual law reform was strong in the south of the state there was still staunch opposition in the north. For example,

¹⁴⁰ "Opposition grows to Tas anti-gay proposals", *Sydney Star Observer*, No.140, 21 September 1991, p. 4.

in December 1990 the Ulverstone Municipal Council passed a motion opposing the decriminalisation of homosexuality. The motion went on to say: 'the Municipality of Ulverstone has no duty or obligation to its gay or lesbian constituents'; it also urged all local government bodies in the north west region to join its anti-law reform campaign.¹⁴¹

After an often heated debate, which largely ignored the health issues and concentrated on homosexuality and law reform, the bill was passed by the House of Assembly on 19 December 1990. Because the Government bill was passed the private member's bill that had been introduced by Rev. Lance Armstrong lapsed. Debate on the bill in the Upper House was remarkable for the extreme language used by some conservative members. There were calls for homosexual activists to be imprisoned; forced expatriation of all homosexuals from Tasmania; and the reintroduction of the death penalty for homosexuals. It came as no surprise when the Legislative Council rejected the bill in July 1991.

Despite the parliamentary set-backs, 1991 was not all gloom and doom. The efforts and sacrifices of activists working for law reform received recognition when in August, Rodney Croome, TGLRG Campaign Manager, was awarded the inaugural Australian Democrats Chris Carter Award. This national award was made in "recognition of Mr Croome's consistent efforts in promoting political awareness aimed at changing laws and attitudes affecting gay and lesbian people."¹⁴² In November 1991 Rodney Croome was one of three human rights activists to be named Tasmanian Humanitarian of the Year, in recognition of his "outstanding contribution to freedom of expression and great courage in campaigning for gay and lesbian rights."¹⁴³ Later, in 2014, Rodney Croome was named Tasmanian of the Year acknowledging "the personal sacrifices Mr Croome has made campaigning for equal rights over the past 26-years."¹⁴⁴

The undisguised hatred of the majority of members of the Tasmanian Legislative Council towards homosexuals caused the TGLRG to devise a new strategy. In a move which demonstrated both the sophistication and determination of the Tasmanian homosexual rights movement, it was decided to take the case for law reform directly to the United Nations Human Rights Committee.¹⁴⁵ This new strategy side-lined Tasmanian politicians, and concentrated on gaining the support of federal politicians and agencies. The strategy was eventually successful in ridding Tasmania of its anti-homosexual laws, but it proved to be an agonisingly slow process and change had to wait until 1997.

Australia is a signatory to the International Covenant on Civil and Political Rights (ICCPR) which imposes an obligation on the Commonwealth Parliament to uphold human rights. A major weakness of the treaty was that it

¹⁴¹ "Health and cleansing (Ulverstone does it again)", *Pink Thylacines*, Feb 1991, p. 7 and "When are we leaven?", *Pink Thylacines*, May 1991, final page.

¹⁴² *Pink Thylacines*, November 1991 p. 4.

¹⁴³ *Pink Thylacines*, January 1992, p. 6.

¹⁴⁴ Website of the Premier of Tasmania, 30 October 2014 -

http://www.premier.tas.gov.au/releases/tasmania_australian_of_the_year_awards

¹⁴⁵ Flanagan, Tom, "Gay law reform to go to United Nations", *Pink Thylacines*, Nov 1991, pp. 7-8.

did not permit citizens to complain directly to the United Nations Human Rights Committee (UNHRC) directly if they believed their country was in breach of the treaty. This anomaly was rectified when, in 1991, the Commonwealth Government agreed to accept the First Optional Protocol (FOP) to the ICCPR. The FOP allows Australian citizens to take a case directly to the United Nations Human Rights Committee, if they believe that any of their human rights, as set out in the Covenant, have been violated or infringed.

The TGLRG sought the assistance of the Australian Human Rights and Equal Opportunities Commission in preparing a case against Tasmania's anti-homosexual laws. Complaints can only be lodged by individuals, not groups, and activist Nick Toonen volunteered to be the complainant. Toonen's submission was lodged with the committee on 25 December 1991, the first day the FOP came into force for Australia, and in it he argued that Tasmania's *Criminal Code*, which prohibited sexual behaviour between consenting adult males in private, violated his right to privacy (Article 17 of the ICCPR), his right to equality before the law and equal protection of the law (Article 2.1 of the ICCPR), and his right not to face unnecessary discrimination (Article 26 of the ICCPR).¹⁴⁶

Nick Toonen's complaint was the first time UNHRC had been asked to consider a complaint concerning Australia and it was the first complaint from a discrimination case based on sexuality.

The following timeline gives an insight into workings of United Nations committees and the complexities associated with complying with their protocols and procedures.

Before a complaint will be heard by the UNHRC it has to be accepted as an admissible complaint, that is, the committee has to satisfy itself that the complaint is within its jurisdiction and that there is sufficient evidence to support an arguable case.

Toonen's complaint had been referred to a working party of the UNHRC, and in April 1992 it wrote to the Commonwealth Labor Government to inquire whether there was any possibility that the Commonwealth might intervene to help resolve the complaint. The UNHRC also wrote to Toonen asking him to provide further information in support of his complaint. The Commonwealth, in turn, wrote to the Tasmanian Liberal Government seeking its view of Toonen's complaint. Tasmania's response was that it rejected the basis of Toonen's complaint, it also argued the complaint was inadmissible on technical grounds.

In its reply to the UNHRC working committee the Commonwealth included the reply it received from the Tasmanian Government and added that it had "no wish to challenge the admissibility of the communication (Toonen's complaint) on any ground."

¹⁴⁶ Communication to The Human Rights Committee C/- Centre for Human Rights, United Nations Office, Switzerland, submitted by Nicholas Toonen for consideration under the First Optional Protocol to the International Covenant on Civil and Political Rights, dated 25 December, 1991.

In November 1992 the UNHRC wrote to the Commonwealth advising that it had accepted Toonen's complaint as admissible and asked for the Commonwealth's comments on the merits of the complaint. It took almost a year for the Commonwealth to prepare its reply. The reply rejected the Tasmanian Government's position and made an important point. The Commonwealth informed the committee that should it find that the Tasmanian *Criminal Code Act* violated the United Nations Human Rights Charter then the Commonwealth would accept its decision.

On 12 April 1994, almost two and a half years after he lodged his complaint, the nineteen member United Nations Human Rights Committee unanimously upheld Nick Toonen's complaint, and ruled that the anti-homosexual laws within Tasmania's *Criminal Code* were in breach of international human rights standards. The committee's decision made it clear that the International Covenant on Civil and Political Rights "is breached not only by the possibility of arrest under the challenged laws but also by the discrimination, harassment and stigma created by the laws."¹⁴⁷ The decision was the first time an international tribunal had recognised that gay and lesbian rights were protected by human rights conventions.

The UNHRC also ruled that the term "sex" in Article 2 of the ICCPR includes sexual orientation. This aspect of the committee's decision created a precedent of international significance because it opened the door for gay men and lesbians in countries that have anti-homosexual laws, and are signatories to the convention, and have signed the First Optional Protocol, to lodge a complaint.¹⁴⁸

The ruling of the UNHRC had no immediate impact on the lives of homosexuals in Tasmania, or on the validity of Tasmania's anti-homosexual laws. Indeed, the Tasmanian Government immediately announced that it would not change its laws and would launch a High Court challenge to any Commonwealth legislation that attempted to implement the UNHRC's ruling.

This was a politically sensitive matter as any attempt by the Commonwealth to overrule a state law would inevitably be seen by some as an attack on states' rights, because constitutionally the power to make criminal laws belongs to the States, not the Commonwealth. This is why criminal laws often differ from one State to another. However, the High Court of Australia had ruled that circumstances can arise that allow the Commonwealth to legislate in areas that ordinarily belong to the States. In the *Koowarta case (1982)* and the *Franklin Dam case (1983)*, the High Court decided that the Commonwealth's external affairs power gives the Commonwealth Parliament the authority to make laws to fulfil Australia's international treaty obligations, even if this results in the Commonwealth having to legislate to overrule state laws in areas previously thought to belong only to the States. Australia has signed and ratified the International Covenant on Civil and Political Rights. It was the United Nations Human Rights Committee's ruling that the anti-homosexual laws provisions of Tasmania's *Criminal Code Act* were in breach of this treaty that made it possible for the Commonwealth to legislate to implement the committee's decision, thus upholding Australia's treaty obligations.

¹⁴⁷ "Tasmania UN triumph", *OutRage* (Melbourne) No. 132, May 1994, p. 10.

¹⁴⁸ *Ibid.*

The Commonwealth Government was reluctant to force the issue and hoped that public pressure, from both within Tasmania and nationally, would persuade the Tasmanian Government to comply with the UNHRC's ruling. However, the opponents of law reform maintained their rage and it became apparent during the second half of 1994 that there was no possibility of the Tasmanian Parliament changing its position. The situation left the Commonwealth Government with little choice but to "bite the bullet", which it did.

In December 1994 the Commonwealth Parliament passed the *Human Rights (Sexual Conduct) Act (Cwth)*¹⁴⁹ which guaranteed all Australians aged 18 or more the right to sexual privacy. Section 4 of the Act says:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

For the purpose of this section, an adult is a person who is 18 years old or more.

This meant that there was a conflict between the anti-homosexual provisions of the Tasmanian *Criminal Code Act* and the provisions of the *Human Rights (Sexual Conduct) Act (Cwth)*. While it is unusual for there to be conflicting Commonwealth and State legislation on a matter, the Constitution contains a provision for overcoming such conflicts. Section 109 of the *Commonwealth of Australia Constitution Act 1900* (UK) says:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Even after the passage of the *Human Rights (Sexual Conduct) Act (Cwth)* the Upper House of the Tasmanian Parliament continued to refuse to repeal the anti-homosexual provisions of the *Criminal Code Act*. The continued existence of these provisions, and uncertainty about exactly what the phrase "arbitrary interference with privacy" in the Commonwealth legislation meant, created a fear among many homosexuals that they could still be harassed by police, and could still be discriminated against by employers and others, because "homosexuality is against the law". The Tasmanian Gay and Lesbian Rights Group decided that the best way to get a definitive ruling was to go to the High Court, and in November 1995 it lodged a case asking for a declaration that the anti-homosexual provisions of Tasmania's *Criminal Code Act* were an "arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights."

In May/June 1996 the Tasmanian Government dropped its opposition to homosexual law reform and allowed a conscience vote. The bill was passed by the Lower House, but was again rejected in the Upper House 10 votes to 8. In February 1997 the High Court agreed to hear the case against Tasmania's anti-homosexual laws.

¹⁴⁹ *Human Rights (Sexual Conduct) Act (Cwth)* No. 179 of 1994

Within a month of the High Court agreeing to hear the case, and faced with the likelihood of an adverse ruling, the Legislative Council finally accepted defeat. The Tasmanian Government, in an effort to appease their own conservative members in the Council, chose not to introduce its own homosexual law reform bill; instead it allowed the leader of the Greens Party, Christine Milne, to introduce one. Although the bill passed comfortably in the Legislative Assembly when it went to the Legislative Council it scraped through by a single vote. With the passage of the bill the High Court challenge was withdrawn.

The *Criminal Code Amendment Act 1997*¹⁵⁰ received the royal assent on 13 May 1997 and came into effect the next day. This act repealed references within s.122 of the *Criminal Code Act* to persons who engaged in sexual intercourse with another person "against the order of nature" (anal intercourse), as well as persons (male or female) who consented to sexual intercourse against the order of nature. The act also repealed s.123 which related to males engaging with other males in indecent acts ("indecent acts" included mutual masturbation) whether in private or in public.

The age of consent for engaging in acts of a sexual nature in Tasmania is 17 for both heterosexual and homosexual sex. There are three defences available to people charged with having sex with people under 17.¹⁵¹ First, it is a defence to establish that the accused believed on reasonable grounds that the other person was of or over 17. Second, it is a defence to a charge of engaging in an act of a sexual nature, other than anal intercourse¹⁵², with a person of or over the age of 12, but under 17 where the accused was no more than 3 years older than the other person at the time of the act.¹⁵³ Third, it is a defence to a charge of engaging in an act of a sexual nature, other than anal intercourse, with a person of or over the age of 15, but under 17 where the accused was no more than 5 years older than the other person at the time of the act.¹⁵⁴

¹⁵⁰ Criminal Code Amendment Act 1997 (Tas), (No. 12 of 1997)

¹⁵¹ *Criminal Code Act 1924* (Tas), s. 124 (2)

¹⁵² Ibid. s. 124 (5)

¹⁵³ Ibid. s. 124 (3)

¹⁵⁴ Ibid. s. 124 (3)

NORTHERN TERRITORY

The Northern Territory became self-governing on 1 July 1978 following the passing of the *Northern Territory Self Government Act* by the Commonwealth Parliament.

The Northern Territory is the only example in Australia where homosexual law reform came about without sustained and organised pressure from homosexuals and/or civil libertarians. This is all the more noteworthy given the usually socially conservative nature of the Country Liberal Government of the day. The following comments of David Barrett, who worked as a lawyer for the Northern Territory Department of Law between 1979 and 1989, suggest that while there might not have been any formal lobbying for homosexual law reform, behind the scene quiet discussions had taken place. In an interview published in Dino Hodge's book, *Did you meet any malagas?*, Barrett said: "By and large the Country [Liberal] Party Government up here had taken the view that these matters were 'private' and so homosexual law reform came in very rapidly after '78 (when the Territory became self-governing) as part of the amendments to the Criminal Code. It was an express thing they did because there was some discussion on the age limit which was settled on as eighteen, whereas we'd pressed for sixteen."¹⁵⁵

The parliament of the Northern Territory consists of one house, the Legislative Assembly, and in 1983 it passed the *Criminal Code*¹⁵⁶ which legalised some homosexual acts between consenting adult males in private. The term "in private" was defined as meaning "with only one other person present and not within the view of a person not a party to the act".¹⁵⁷

The act imposed an age of consent of 18 for homosexual sex compared with 16 for heterosexual sex.¹⁵⁸ However, it allowed a defence to a charge of carnal knowledge (sexual intercourse) of a male under the age of 18, or gross indecency with a male under the age of 18, where the accused person believed, on reasonable grounds, that the other male was an adult. It was an offence for a male to have carnal knowledge of a male or to commit an act of gross indecency with a male in public or in a public place. The term "in public", as with the restricted definition of "in private", meant "with more than one other person present or within the view of a person not a party to the act".¹⁵⁹

The age of consent for homosexual sex was lowered to 16 when the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003*¹⁶⁰ was proclaimed on 17 March 2004. This legislation was strongly opposed by members of the Country Liberal Party. In a tight vote its fate came down to

¹⁵⁵ Hodge, Dino, *Did you meet any malagas?*, Nightcliff, NT, Little Gem Publications, 1993, p. 17.

¹⁵⁶ Criminal Code 1983, No. 47 of 1983

¹⁵⁷ *Criminal Code 1983* (NT), Part 5 Division 2, Offences against Morality.

¹⁵⁸ *Criminal Code 1983* s 1.

¹⁵⁹ *Criminal Code 1983* (NT), Part 5 Division 2, Offences against Morality.

¹⁶⁰ Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003 (NT), No. 1 of 2004

the support of two members of the Country Liberal Party who defied their party and crossed the floor to vote with the Labor Government following, a lengthy parliamentary debate that ended at 3am.¹⁶¹

Although the general age of consent in the Northern Territory is now 16 for both heterosexual and homosexual sexual acts there is a defence available to people charged with having sex with a person of or above 14, but under 16, where the accused believed on reasonable grounds that the other person was of or above 16.¹⁶²

¹⁶¹ ABC Online "NT lowers gay age of consent – ABC Northern Territory – Local News" Wednesday, 26 November 2003.

¹⁶² Criminal Code 1983 (NT), s. 127 (4)

State	Date legislation was		Name of relevant Act	Introduced by	Government in power and head of government	Based on homo/hetero equality?	Age of consent	
	Passed	Proclaimed					Homo	Hetero
South Australia	25 October 1972	9 November 1972	Criminal Law Consolidation Act Amendment Act, 1972 (SA) amended the principal act, the Criminal Law Consolidation Act 1935 (SA)	Murray Hill (Liberal Country League) – as private member's bill	Labor, Don Dunstan, Premier; but both parties allowed free vote	No	21	17
	17 September 1975	2 October 1975	Criminal Law (Sexual Offences) Act, 1975 (SA) amended the principal act, the Criminal Law Consolidation Act, 1935 (SA)	Peter Duncan (Labor) – as private member's bill	Labor, Don Dunstan, Premier	Yes	17 for sexual intercourse 16 for other acts of a sexual nature	17 for sexual intercourse 16 for other acts of a sexual nature
Victoria	23 December 1980	1 March 1981	Crimes (Sexual Offences) Act, 1980 (Vic) amended the principal act, the Crimes Act, 1958 (Vic)	Haddon Storey (Liberal), Attorney General	Liberal/National Party Rupert Hamer, Premier	Yes	16/18 (see * below) ¹⁶³	16/18 (see * below)
	10 April 1991	5 August 1991	Crimes (Sexual Offences) Act, 1991 (Vic) amended the principal act, the Crimes Act, 1958 (Vic)	Jim Kennan (Labor), Attorney-General	Labor, Joan Kirner, Premier	Yes	16	16

¹⁶³ * Age of consent in Victoria following the 1981 reform was 18 in general; 16 if person has previously engaged in a legal "act of sexual penetration" with person other than the accused, or if their partner is no more than 5 years older, or if person reasonably believed their partner was 18; 10 if partner is no more than 2 years older.

State	Date legislation was		Name of relevant Act	Introduced by	Government in power and head of government	Based on homo/hetero equality?	Age of consent	
	Passed	Proclaimed					Homo	Hetero
NSW	22 May 1984	8 June 1984	Crimes (Amendment) Act, 1984 (NSW) amended the principal act, the Crimes Act 1900, (NSW)	Neville Wran (Labor), Premier – as a private member's bill	Labor, Neville Wran, Premier	No	18	16
	27 May 2003	13 June 2003	Crimes Amendment (Sexual Offences) Act, 2003 (NSW) amended the principal act, the Crimes Act 1900, (NSW)	Bob Debus (Labor), Attorney-General	Labor, Bob Carr, Premier	Yes	16	16
Queensland	29 Nov. 1990	14 December 1990	Criminal Code and Another Act Amendment Act 1990 amended the principal act, the Criminal Code Act, 1899 (Qld)	Dean Wells (Labor), Attorney- General	Labor, Wayne Goss, Premier	Yes	16 in general; 18 for anal intercourse	16 in general; 18 for anal intercourse
Western Australia	7 December 1989	March 1990	Law Reform (Decriminalisation of Sodomy) Act, 1989 (WA) amended the principal act, the Criminal Code Compilation Act, 1913 (WA)	John Halden (Labor) – as a private member's bill	Labor, Peter Dowding, Premier [Carmen Lawrence Premier by time the bill was proclaimed]	No	21	16

State	Date legislation was		Name of relevant Act	Introduced by	Government in power and head of government	Based on homo/hetero equality?	Age of consent	
	Passed	Proclaimed					Homo	Hetero
Western Australia - continued	10 April 2002	20 September 2002	Acts Amendment (Lesbian and Gay Law Reform) Act, 2002 (WA) amended the principal act, the Criminal Code Compilation Act, 1913 (WA)	Jim McGinty (Labor), Attorney-General	Labor, Dr Geoffrey Gallop, Premier	Yes	16	16
ACT	July 1976	8 Nov 1976	Law Reform (Sexual Behaviour) Ordinance, 1976 (ACT) amended the principal act, the Crimes Act 1900 of the State of New South Wales in its application to the Territory	Tony Staley (Liberal), Minister for the Capital Territory	Liberal/National Party, Malcolm Fraser, Prime Minister	No	18	16
	21 November 1985	28 November 1985	Crimes (Amendment) Ordinance (No.5) 1985 (ACT) amended the principal act, the Crimes Act 1900 of the State of New South Wales in its application to the Territory	Tom Uren (Labor), Minister for Territories	Labor, Bob Hawke, Prime Minister	Yes	16	16
Northern Territory	31 August 1983	1 January 1984	Criminal Code, 1983 (NT)	Jim Robertson (Liberal/National), Attorney- General	Liberal/National Party, Paul Everingham, Chief Minister	No	18	16

State	Date legislation was		Name of relevant Act	Introduced by	Government in power and head of government	Based on homo/hetero equality?	Age of consent	
	Passed	Proclaimed					Homo	Hetero
Northern Territory – continued	26 November 2003	17 March 2004	Law Reform (Gender, Sexuality and De Facto Relationships) Act, 2003 amended the principal act, the Criminal Code 1983	Dr Peter Toyne (Labor), Attorney-General	Labor, Clare Martin, Chief Minister	Yes	16	16
Tasmania	15 April 1997	14 May 1997	Criminal Code Amendment Act, 1997 amended the principal act, Criminal Code Act, 1924	Christine Milne, Leader of the Greens Party.	Liberal, Tony Rundle, Premier	Yes	17	17

AGE OF CONSENT LAWS IN AUSTRALIA**(as at March 2010)****SOUTH AUSTRALIA**

Age of consent

17 for sexual intercourse (s. 49 (3) *Criminal Law Consolidation Act 1935*).

Defences

It is a defence to a charge of sexual intercourse with a 16 year old if:

- the person charged was under 17 at the time of the offence; or
- if older, the accused believed on reasonable grounds that the other person was 17 at the time of the offence (s. 49 (4) *Criminal Law Consolidation Act 1935*).

16 for acts of a sexual nature, other than sexual intercourse (s. 58 (1) *Criminal Law Consolidation Act 1935*).

Defences

It is a defence to a charge of indecent assault with a 16 year old if:

- the person charged was under 17 at the time of the offence; or
- if older, the accused believed on reasonable grounds that the other person was 17 at the time of the offence (s. 57 (3) *Criminal Law Consolidation Act 1935*).

There is no defence of reasonable belief as to age available where a person is charged with engaging in an act of gross indecency with a person aged under 16.

18 for engaging in any act of a sexual nature with a person who is under their authority (s. 49 (5) and s. 57 (1) *Criminal Law Consolidation Act 1935*).

Defences

There is no defence of reasonable belief as to age available to a person who, being in a position of authority in relation to a person under 18, engages in acts of a sexual nature with that person (s. 57 (1) *Criminal Law Consolidation Act 1935*).

VICTORIA

Age of consent

16 for acts of a sexual nature (s. 45 (1) and s. 47 (1) *Crimes Act 1958*).

18 for engaging in acts of a sexual nature with a person who is under their care, supervision or authority (s. 48 (1) *Crimes Act 1958*).

Victoria – continued

Defences

It is a defence to a charge of engaging in an act of a sexual nature with a person between the ages of 10 and 16 where the court is satisfied, on the balance of probabilities, that at the time of the offence the accused:

- was no more than 2 years older than the other person;
- or
- believed on reasonable grounds that the other person was of or above 16 (s. 45 (4) and s. 47 (2) of the *Crimes Act 1958*).

It is a defence to a charge of engaging in an act of sexual penetration of a 16 or 17 year old person who is under their care, supervision or authority, if:

- the accused can satisfy the court, on the balance of probabilities, that at the time of the offence the accused believed on reasonable grounds that the person was 18 or older (s. 48 (2) of the *Crimes Act 1958*).

WESTERN AUSTRALIA

Age of consent

16 for acts of a sexual nature (s. 321 (2) *Criminal Code Act Compilation Act 1913*).

18 for engaging in acts of a sexual nature with a person who is under their care, supervision or authority of the other person (s. 321 (7) and s. 322 (2) *Crimes Code Act Compilation Act 1913*).

Defences

It is a defence to a charge of engaging in an act of sexual penetration with a person of or over the age of 13 and under the age of 16 if:

- the accused believed on reasonable grounds that the person was of or over the age of 16; and
- was not more than 3 years older than the person (s. 321 (9) *Criminal Code Act Compilation Act 1913*).

There is no defence of reasonable belief as to age available to a person who, being in a position of authority in relation to a person under 18, engages in sexual acts with that person (s. 322 (7) *Criminal Code Compilation Act 1913*).

QUEENSLAND

Age of consent

16 for acts of a sexual nature, other than anal intercourse (s. 210 (1) *Criminal Code Act 1899*).

18 for anal intercourse (s. 208 (1) *Criminal Code Act 1899*).

Defences

It is a defence to a charge of engaging in anal intercourse with a person under 18 if that person was of or over 12 and:

- the accused believed, on reasonable grounds, that the other person was of or over the age of 18 (s. 208 (3) *Criminal Code Act 1899*).

It is a defence to a charge of engaging in an act of a sexual nature with a person under 16 if that person was of or over 12 and:

- the accused believed, on reasonable grounds, that the other person was of or over the age of 16 (s. 210 (5) *Criminal Code Act 1899*).

AUSTRALIAN CAPITAL TERRITORY

Age of consent

16 for acts of a sexual nature (s. 55 (2) *Crimes Act 1900*)

Defences

It is a defence to a charge of engaging in an act of a sexual nature with a person under 16, if:

- the accused believed, on reasonable grounds, that the other person was of or over 16 (s. 55 (3) (a) and s. 61 (3) (a) *Crimes Act 1900*);

or

- at the time of the alleged offence the person on whom the offence is alleged to have been committed was of or above 10 and the accused was not more than 2 years older (s. 55 (3) (b) and s. 61 (3) (b) *Crimes Act 1900*).

NEW SOUTH WALES

Age of consent

16 for acts of a sexual nature (s. 66 (C) (3) *Crimes Act 1900*)

18 for acts of a sexual nature with a person who is under their special care (s.73 *Crimes Act 1900*)

Defences

There is no statutory defence of reasonable belief as to age, however, the common law defence of reasonable mistake is available in certain circumstances – see *Chard v Wallis and another, (1988)* 12 NSWLR 453.

TASMANIA

Age of consent

17 for acts of a sexual nature (s. 124 (1) and s. 125B (1) *Criminal Code 1924*)

Defences

It is a defence to a charge of engaging in acts of a sexual nature with a person under the age of 17:

- if the accused believed, on reasonable grounds, that the other person was of or over 17 (s. 124 (2) and s. 125B (2) *Criminal Code*);

or

- for sexual acts other than anal intercourse, if at the time of the alleged offence the person was of or above 15 and the accused was not more than 5 years older (s. 124 (3) (a), s. 124 (5) and s. 125B (3) (a) *Criminal Code Act*);

or

- for sexual acts other than anal intercourse, if that other person was of or above 12 and the accused was not more than 3 years older (s. 124 (3) (b) and s. 125B (3) (b) *Criminal Code 1924*).

NORTHERN TERRITORY

Age of consent

16 for acts of a sexual nature (s.127 (1) *Criminal Code*)

18 for engaging in acts of a sexual nature with a person who is under their special care (s. 128 and s. 1 definition of 'child' and 'adult' *Criminal Code*).

Defences

It is a defence to a charge of engaging in acts of a sexual nature with a person under 16 if:

- the person was of or above 14 and the accused believed on reasonable grounds that the other person was of or above 16 (s. 127 (4) *Criminal Code*).

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