CRIMINAL JUSTICE COMMISSION

QUEENSLAND

REFORMS IN LAWS RELATING TO HOMOSEXUALITY

AN INFORMATION PAPER

Research and Co-ordination Division
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F O R E W O R D

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This paper does not represent what will be the normal format for Reports by the Commission. It is more accurately described as an information paper.

The document takes this form by agreement between the Commission and the Chairman of the Parliamentary Criminal Justice Committee, Mr. P. Beattie.

The Commission has not sought to carry out the consultation process which will be a part of the preparation of its normal reports. Instead, in the interests of expedition and the best use of resources, the Commission has put together enough material to provide a platform upon which the Parliamentary Committee can base a program of public hearings, while the Commission attends to other matters on the agenda which it has agreed with the Parliamentary Committee.

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CORRIGENDUM

Page 28 - Crime (Sexual Offences) Act 1980 to read: Crimes (Sexual Offences) Act 1980.

Page 44 - Final paragraph: delete.

CONTENTS

EXECUTIVE SUMMARY

During the last 30 - 40 years a number of countries have decriminalized homosexual acts between consenting adults in private. In Australia, such acts are still illegal in Queensland and Tasmania. Amongst others the AIDS issue has become a major concern in any debate on homosexuality since the mid 1980's. The overwhelming majority of all AIDS deaths in Australia have been linked to the transmission category homosexuals/bisexuals.

A number of issues emerge out of debates on amending laws relating to homosexuality in Australia. Those arguing for decriminalization point out that laws which criminalize homosexual acts violate civil liberty, discriminate against otherwise law abiding citizens, and involve scarce resources in enforcing private bedroom offences that are difficult to enforce. Those who argue against decriminalization express concerns that such a move may seduce young people to practice homosexuality, subject children to sexual abuse, contribute to the breakdown of the nuclear family, and promote homosexual behaviour as part of the teaching in primary and secondary schools.

Public opinion surveys are becoming increasingly influential in the shaping of social policies. However, they need to be designed very carefully. The public opinion survey on homosexuality conducted in September 1989 indicates that a majority of the respondents supported legalization of homosexual acts between consenting adults in private. This result also revealed that respondents in the 25 - 49 year age group tended to be most liberal in their views.

Although, homosexuality has been decriminalized in a number of jurisdictions, it is difficult to ascertain its impact on society. There is a need to evaluate the impact in order to allay the fears and concerns of a substantial segment of the population.

There is an abundance of legislative models from which the decision makers in Queensland can draw directions. Homosexual law reform is not just a simple matter of removing sanctions from the criminal code; provisions still need to be made to protect children from sexual molestation, protect the victims of non-consensual homosexual acts, and guard public decency.

CHAPTER 1

HOMOSEXUAL LAW REFORM

INTRODUCTION

Homosexual behaviour between males has been illegal in most countries. Since early last century, however, there have been moves to liberalize the law. Particularly during the last 30 - 40 years many countries have repealed some of these laws. In Australia six jurisdictions have decriminalized homosexual behaviour (differences between jurisdictions will be discussed later), only Tasmania and Queensland still maintain homosexual behaviour as being illegal. In Tasmania, the Law Reform Commission recommended decriminalization of homosexual acts in 1982, but the state Parliament did not agree with the recommendations. Currently, in both states, increasing discussions and debate are taking place - in Tasmania the Accord between the present government and the Green Independents provide for decriminalization of homosexual acts between consenting adults in private, however the state Parliament is yet to debate the issue. In Queensland, the report of the Commission of Inquiry (Fitzgerald Commission), through its recommendations to review reform of law concerning homosexual acts, has added to the growing number of voices on the issue.

The purposes of this paper are as follows:

(1) To describe the issues concerning homosexuality and homosexual acts and offer views of experts and interest groups.

(2) To present a summary of major points raised in Parliamentary debates in other jurisdictions.

(3) To offer results of research and surveys on the issue.

(4) To provide a comparative analysis of a selection of existing legislative models.

(5) To summarize current knowledge and allude to some of the issues that should be considered while reviewing homosexual law reform.

ISSUES CONCERNING HOMOSEXUALITY

The terms homosexuality and homosexual behaviour carry moral, ethical, social, medical, and legal meanings which vary with the context in which they are used. These are exemplified by labels assigned to homosexuals by certain groups, and reactions to those supporting reform of the law on homosexual behaviour. Traditionally the church has been one of the most vocal opponents

of decriminalization of homosexual behaviour. However, the church's attitudes are changing. At a seminar[1] in 1977 the Dean of Sydney, the Very Reverend Dean Shilton, emphasized the continuing condemnation of homosexual behaviour in both the new and old testaments and argued that homosexuality should never be given the status of an accepted form of sexual behaviour. Yet, Melbourne and other Anglican dioceses, the New South Wales Presbyterian Assembly and the Methodist Church in Western Australia have urged changes in the law. The National Committee for Justice and Peace, an organization sponsored by the Catholic Bishops of Australia, in a press release deplored:

> "Discrimination against any minority group, and affirm the obligation on those responsible for administering laws to ensure just and fair treatment of homosexuals."[2]

Similarly, the Diocese of New York, while issuing a statement on private morality, stated:

> "... that the penal law is not the instrument for the control of such practices (homosexual acts) which are privately engaged in, where adults are involved, and where there is no coercion. We favour repeal of those statutes that make such practices among competent and consenting adults criminal acts."[3]

Those who oppose reform of law on moral and ethical grounds maintain that decriminalization would produce a corrosive effect on society. That if criminal sanctions are removed:

(a) it is likely to promote within society the acceptance of increasing incidences of homosexual activity;

(b) it is likely to result in more public displays of homosexual acts;

(c) it is likely to threaten the institution of marriage and the existence of the family;

(d) it is likely to put pressure on and encourage individuals, particularly young people, to engage/experiment in homosexual behaviour; and

(e) it is likely that sex education courses in schools would depict homosexual behaviour as a legitimate form of sexual expression.

1 Seminar on Victimless Crime, New South Wales Government, February 1977.

2 Quoted in the Report of the Royal Commission on Human Relationships, Final Report, Vol. 5, Canberra: Australian Government Publishing Service, 1977, p. 103.

3 Quoted in the Report of the Royal Commission on Human Relationships, p. 103.

In the social context, those who oppose homosexual law reform claim that decriminalization would result in the decline of birth rates and increase crime associated with the homosexual sub-culture, i.e. solicitation, child abuse and sadistic crimes of violence. Opposition on medical grounds gains strength from the description of homosexuality in standard psychiatric textbooks as "deviancy". This is seen as a depraved and perverted act and, therefore, the government and the law have an obligation to restrict such practices. Since the mid 1980s, in the view of some, the AIDS epidemic constitutes a strong argument against reform of law affecting homosexual behaviour.

Those who support decriminalization of homosexual behaviour appear to have amassed a significant amount of support through a number of interest groups and through research and surveys. On the issue of moral and ethical values, they argue that homosexual acts in private between two consenting adults do not affect public morals and therefore the law should not interfere with private behaviour.

The issue was addressed by the Commission of Inquiry and the report has this to say:

> "Where the moral issue is one upon which there is room for serious divergent opinions, the legislature should interfere only to the extent necessary to protect the community, or any individuals with special needs. Generally, those who take part voluntarily in activities some consider morally repugnant should not be the concern of the legislature, unless they are so young or defenceless that their involvement is not truly voluntary."[4]

Examples of changes in the views of some sections of the church have been given earlier. But as the Report on Human Relationship stated:

> "The movement to end discrimination in law against some forms of sexual conduct may be partly due to 'the new morality' and modern thought on sexual permissiveness, but it is also strongly related to the rights of minority groups in a democratic society, and to the idea that discrimination may be personally destructive to the individuals who comprise the minority groups."[5]

On the social side, proponents argue that decriminalization will aid the psychological and social adjustment of homosexual men, in turn men will experience more self-acceptance of their homosexuality. As homosexuality becomes more acceptable and no longer a criminal offence the opportunity for blackmail diminishes, along with social discrimination.

4 Report of a Commission of Inquiry Pursuant to Orders in Council, 1989, p. 186.

5 Report of the Royal Commission on Human Relationships, Vol. 5, Canberra: Australian Government Publishing Service, 1977, p. 102.

Also, it is claimed that decriminalization will enable the police to devote resources to the investigation of what generally are regarded as serious criminal offences.

HOMOSEXUALITY AND THE AIDS ISSUE

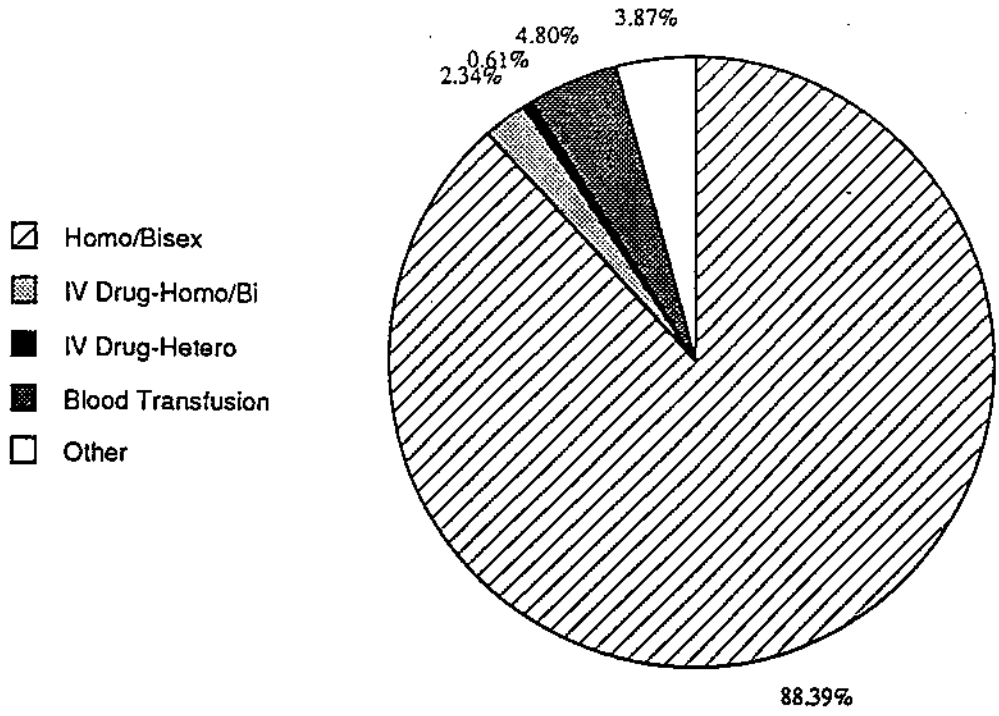
Opponents of decriminalization use AIDS as a good reason for not reforming the law regarding homosexuality.

> "Homosexual and bisexual men continue to comprise approximately 90% of all AIDS cases in Australia. This underlies the close relationship between AIDS prevention and legal sanctions against the largest at risk group."[6]

According to latest figures available, over 88 percent of all AIDS deaths in Australia[7] to 23rd February, 1990 have been linked to the transmission category homosexuals/bisexuals. An additional 3.87 percent of the deaths have been associated with the intravenous drug user homosexual/bisexual category. (Figure 1).

FIGURE 1

PERCENTAGE OF ALL AIDS DEATHS BY TRANSMISSION CATEGORY TO 23 FEBRUARY, 1990



6 Loff, B., AIDS Prevention and the Law - A discussion of the legal status of prostitution and homosexuality in W.A., Qld and Tas. Paper prepared for the Australian Federation of AIDS Organization, July 1989.

7 National Centre in HIV Epidemiology and Clinical Research, AIDS and HIV Surveillance, Australia, 23 February 1990.

There is no hard evidence available to the supporters of decriminalization as to its impact on AIDS. In a Policy Information Paper on the National HIV/AIDS Strategy[8] it is argued that laws penalizing homosexual activity impede public health programs promoting safer sex to prevent HIV transmission, by driving underground many of the people most at risk of infection. The paper further states that whilst homosexual acts remain illegal, people engaging in them will be deterred from presenting for testing, counselling support and treatment. The Information Paper stressed the role of education and recommended that the:

> "State Governments should review legislation, regulations and practices which may impede HIV education and prevention among homosexual and bisexual men and people who work with them."[9]

In a discussion paper Loff argues that the creation of a right environment is crucial in the fight against the spread of AIDS.[10] Such an environment, is one in which people are at ease with their status, have a positive self image and easy access to information about AIDS and to health professionals. Research by the Queensland AIDS Council have shown that a significant number of homosexuals do not have a HIV antibody test at all until they are physically unwell.

Finally, Loff argues that:

> "When society ceases to condition homosexuals to feel unworthy of assuming their rightful place in the community, the first step will have been taken in breaking the cycle. AIDS is becoming a catalyst for change, and while disease control may be the most urgent reason for law reform, a more lasting benefit will be a more complete realization of the potential of homosexuals as productive members of the society."[11]

8 National HIV/AIDS Strategy - A Policy Information Paper, Canberra: Australian Government Publishing Service, 1989.

9 Ibid, p. 29.

10 Loff, B., op cit, p. 8.

11 Opcit, p. 23.

CHAPTER 2

INTERSTATE PARLIAMENTARY DEBATES ON THE DECRIMINILIZATION OF HOMOSEXUALITY

INTRODUCTION

The first state in Australia to decriminalize homosexual behaviour was South Australia (Criminal Law [Sexual Offences] Amendment Bill) in 1975. Victoria (Crimes [Sexual Offences] Bill) followed suite in 1980, and the latest state in Australia to amend its statutes was Western Australia (Criminal Code Amendment [Decriminalization of Homosexuality] Bill) in 1989. The Parliamentary debates preceding the passing of these Bills reflect very much the issues discussed in the introduction. As indicated earlier, Tasmania and Queensland are the two states where such behaviour is still illegal.

ARGUMENTS FOR DECRIMINALIZATION

Reforms Overdue for Laws that are Obsolete

The Bills were introduced in the Parliaments because of an increasing groundswell support for the decriminalization of homosexuality. Existing laws were seen as a violation of civil liberties and a shameful blemish upon the Statutes of the Parliament. Given the results of the Morgan Gallop Poll published in the Bulletin (October 1989), the indications were that prejudice against homosexuality based upon religious beliefs no longer had majority support within the community.

Prosecution of homosexuals under the Criminal Code in Western Australia were very low, mostly because private bedroom offences are difficult to enforce. The argument that because these cases are seldom prosecuted they should remain on the Statutes to discourage the practice of homosexuality, effectively denies 5 to 10 percent of the population their sexual identity.[1]

In the South Australian debate, a reference was made to the murder of Dr. George Duncan and the inquest which had established that his death resulted from victimization because of his homosexuality. It was this incident that triggered the subject of homosexual law reform to the fore in South Australia. Just as homosexuals are very prone to blackmail, they are also vulnerable to "pooftah bashing". These assaults by gangs of youths upon effeminate looking men frequently result in serious injury and are sometimes fatal. The extent to which these unprovoked attacks occur is unknown, because homosexuals are reluctant to report them to the police for fear of prosecution.

1 Mr. Donovan, Member for Morely, Western Australian Legislative Assembly, Parliamentary Debate, 7th December, 1989

> Even the opposition in the South Australian Parliament believed that people who were homosexuals, who were inoffensive and hurt no one, and who conducted their activities in private should be protected from victimization and saved from the blackmail and other standover tactics that occur. They felt that they should have an equal right to freedom to live their lives as long as they did not interfere with other people and they should not be victimised or interfered with by the law.

It was stated that the law regarding homosexual behaviour was neither humane nor compassionate because it caused unnecessary suffering and served no useful purpose. In fact, it made criminals of thousands of otherwise law-abiding citizens and made a mockery of the social value of minority and individual rights.

Reference was made to other historical views on homosexuality, specifically that of ancient Greece where it was extolled by Plato and Socrates. Many other famous people, like Leonardo da Vinci, James I and Bacon, openly admitted their homosexuality. In that sense homosexuality had always been a part of society, but had not destroyed society.

In the Victorian debate analogies were drawn between attitudes towards homosexuality and previously held attitudes towards left handers. Sinistrals were once considered to be possessed by the devil and were burnt at the stake. In more recent times left handers were forced to use their right hands, but now left-handedness is accepted as being normal.

Inequities Between Sexes and Age

Under the existing law only males have been prosecuted, which means there is an inequity between males and females under the law. In respect to the age of consent there was considerable debate as to whether this should be 18 or 21 years. The Governments argued that if at the age of 18 a person was free to drive, vote, drink, marry, enter into binding contracts, accept full criminal responsibility, and even to die for their country, then they should be free to determine the nature of their sexual encounters.

The Opposition argued that people under the age of 21 years were very vulnerable and subject to external influences that they may regret later. Their fear was that people might be lured into becoming homosexuals, however there is no evidence to support this belief.

During the South Australian debate the issue of discrimination against men under the law was raised. It was said that women could live together and involve themselves in any mutual sexual activity without attracting the sanction of the criminal law but men could not. This was felt to be discrimination on the grounds of sex.

Mental Health Issues

Some members of the Governments pointed out during debates that rather than homosexuals forcing misery and suffering upon society, the reverse was true. This was because people were forced into denying their sexuality and there was a strong body of evidence to suggest that there were high levels of emotional disturbances, depression and suicide amongst young homosexuals because of their failure to come to terms with their own sexuality; more precisely, because of society's failure to come to terms with their sexuality. Endeavours to turn homosexuals into heterosexuals often resulted in disaster and caused unnecessary suffering and distress. Further, the arcane idea that homosexuality was a mental disorder was no longer tolerated by the medical profession.

While some members of the parliamentary Opposition still considered homosexuality to be a disorder and found the proposal negative because it did not take constructive measures for rehabilitation and treatment, supporters argued that homosexual acts were anything but unnatural and they were not physically or mentally aberrant.

ARGUMENTS AGAINST DECRIMINALIZATION

Corruption of Youth

In the Western Australian Legislative Assembly debate on the Law Reform (Decriminalization of Sodomy) Bill, a number of legislators expressed fears that the removal of homosexual offences between consenting adults in private from the Statutes would result in the widespread blatant seduction of impressionable young people to the practice of homosexuality. Part 2 of the Bill was headed "Proselytising Unlawful" and it stated that under this Bill attempts to convert heterosexuals to homosexual would be discouraged. Young adolescents were perceived as being particularly vulnerable to this influence, especially in respect to some of the AIDS education material, which emphasized the erotic potential of the promotion of safer forms of homosexual behaviour.

Even though there were clauses in the Bill which emphasized that it was unlawful to promote or encourage homosexual behaviour as part of the teaching in primary and secondary schools, many members of the Assembly expressed grave concern about the welfare of school children. The Government was accused of intending to introduce positive sex education into schools which would encourage children to believe that homosexual practices were an acceptable sexual option.

It was pointed out during the debate that fears that children could be educated into becoming homosexuals were groundless, that young pubescent and post-pubescent people were subjected to enormous social pressure from home, school, community and the workplace to be heterosexual; to deviate from the majority held beliefs and rules about sexuality means to run the risk of being ridiculed and rejected.

Some members brought to the fore their personal experiences. One member stated that from her own personal experience allowing one's children to associate with homosexuals did not influence them to become gay. In her own case her four children had been cared for by a male homosexual baby-sitter and her 17 year old son, who was just 12 when the baby-sitter first took on the responsibility for the children, was a heterosexual.

One of the more extreme arguments put forward by the Opposition was that decriminalization has seen as the first step in a series that would ultimately lead to the downfall of Western civilization.

Although there was quite a lengthy debate about the age of consent and the susceptibility of adolescents (particularly males) to older homosexuals who might seize upon the opportunity to prey upon their innocence, no mention was made of the sexual curiosity and activities of adolescent males. In the past fifty years there have been numerous studies conducted into human sexuality. The Kinsey Report (1948)[2] indicated that 48% of boys had had sex with other boys as children or teenagers, and most of these had grown up to be normal heterosexual men. The Hite Report (1978)[3] reported 43% of respondents having these kinds of experiences, and she found that there was no correlation between whether a boy had had sexual experience with other boys and whether he considered himself homosexual or heterosexual in adult life. Paul Wilson (1979)[4] concluded that male adolescents actively sought sexual excitement and sometimes sought out older men for sexual satisfaction. Frequently they were the initiators of sexual activity and were often quite assertive or aggressive.

Available literature appears to indicate that almost a half of the male population will have some type of homosexual experience during their formative years. However, given that only about 5 to 10 percent of the male adult population are homosexual, it is unlikely that these youthful encounters have a lasting effect unless the person actually has a predisposition towards homosexuality.

2 Kinsey, Pomeroy and Martin, "Sexual Behaviour in the Human Male". Saunders, 1948. Cited in A.M. Winchester, "The Nature of Human Sexuality", Charles E. Merrill Publishing Company, 1973.

3 Hite, S., "The Hite Report on Male Sexuality", MacDonald Futura Publishers, London, 1981.

4 Wilson, P., "The Man They Called a Monster: Sexual Experiences Between Men and Boys:, Cassell Australia, 1981.

Safety of Children - Sexual Abuse

During the debates, fears pertaining to the sexual abuse of children were expressed. One of the persistent complaints against homosexuals is that they are child molesters or paedophiles. However, statistics from the Advisory and Co-ordinating Committee on Child Abuse in Western Australia indicated that in 1987-88 there were 1,199 cases of sexual abuse of children reported, 81% concerned girls, 18% concerned boys and 1% were unstated.[5] It was pointed out that in the majority of these cases (89%) the perpetrators were known to the victim, and in only 5% of the cases were the abuses committed by strangers.

In a rather histrionic argument one member drew an analogy between homosexuality and incest. He argued that the act of sodomy and the act of incest usually took place in the privacy of the bedroom, so given that they were both sexual actions why did the Government not propose to abolish the penalties for incest as well. It was pointed out that in the case of incest there was clearly a power imbalance within the relationship and there was clearly a victim of abuse.

Sex Education in Schools

The Western Australian Government's election policy on sex education in schools came into focus because it sought to "ensure that in sex education programs, homosexuality is presented as a capacity fundamental in some human beings, the expression of which is basic and natural".[6] The opposition saw this as encouraging children to see homosexual practices as an acceptable sexual option. A member expressed concern for children who he feared would not be taught that homosexuality was wrong and they might be encouraged to experiment with it.

Part 2 of the Bill clearly stated that it was unlawful to promote or encourage homosexual behaviour as part of the teaching in primary or secondary schools, although no penalty was provided. This was because Section 177 of the Criminal Code would subject teachers, both public and private, to the threat of one year's imprisonment for offending against this clause. It was also suggested that there was the possibility that homosexuals should go into schools to discuss their attitudes, however this was not supported by either side of the house.

5 Report from the Western Australian Advisory and Co-ordinating Committee on Child Abuse, cited in the Western Australian Legislative Assembly, Parliamentary Debate, 7th December, 1989.

6 Australian Labor Party's State Platform Policy, 1989, cited in Western Australian Legislative Assembly, Parliamentary Debate, 7th December, 1989.

HEALTH ISSUES - THE SPREAD OF DISEASE - PARTICULARLY AIDS

The issue of the spread of AIDS was not an issue until the early 1980s and as such it did not figure prominently in Parliamentary debates until the Western Australian Bill on homosexuality was discussed. Indeed the predominant issue for some members in the Western Australian Parliament was the spread of AIDS throughout the homosexual community and its intrusion into the heterosexual community via bisexual men. Some saw it as hypocrisy on the Government's part to be spending millions of dollars in an attempt to control the AIDS epidemic, while at the same time condoning its spread by decriminalizing homosexual behaviour.

The Opposition to the Bill stated that the reason that the homosexual community had so many reported instances of AIDS was because of a subgroup of highly promiscuous individuals who had numerous sexual partners in very short periods of time. However, they did not extend this to emphasize that it was promiscuity that spread sexually transmitted diseases in heterosexuals as well as homosexuals. It was claimed that every major study of AIDS in the world had concluded that active homosexuality either directly or indirectly was responsible for more than 90 percent of all the AIDS cases in the world. The emotive issues of the innocent victims of AIDS (haemophiliacs, babies, etc.) were extensively examined and the blame squarely placed on the irresponsibility of homosexuals. One member went into great detail about the more bizarre sexual practices of some gays, e.g. 'fisting', and talked at length about the homosexual activities in San Francisco's bath houses which he saw as seething breeding places for the spread of the AIDS virus. The data produced by the health departments clearly indicated, as shown in the introduction, that among known deaths from AIDS, since homosexual/bisexual category is grossly over-represented.

Opposition to the Bill also claimed that there was a definite relationship between the number of AIDS cases and the states of Australia which had decriminalized homosexuality, and that if this legislation were to be passed then there would be more deaths from AIDS. The supporters of the Bill countered this statement by pointing out that the AIDS Taskforce had revealed that South Australia which had decriminalized homosexuality in 1975, had no appreciable increase in the incidence of sexually transmitted diseases. It was argued that decriminalization would actually reduce the incidence of AIDS, that the answer to controlling the AIDS epidemic was in education of safe sexual practices, not in repressive legislation. One of the arguments put forward by the Homosexual Lobby, when pressing for the decriminalization of homosexuality, was that it would encourage homosexuals to come forward for AIDS testing, because they could come forward without fear of prosecution.

RELIGIOUS AND MORAL ISSUES

Some of the members found homosexuality repulsive and repugnant. Therefore the removal of homosexual offences from the Statutes represented an affront to them as Christians. Furthermore, they said homosexual acts should not be removed from the Statutes because this was a Christian country and legislation should reflect the views of the Christian majority. While it is difficult to argue against one's moral and religious values, it was pointed out by the supporters of the Bill that more and more church leaders have expressed support for the decriminalization of homosexual acts between consenting adults in private.

CONTRIBUTING TO THE BREAKDOWN OF THE NUCLEAR FAMILY

Members opposing decriminalization expressed concern that the decriminalization of homosexuality would lead to the breakdown of the family, because it would erode the traditional values of society.

However, it was argued that rather than decriminalization leading to the degeneration of family life, the opposite was true. Every homosexual was a member of a family in that they had a mother and a father and the current sanctions against homosexuality made life very difficult for families. Many homosexuals found it difficult to be honest with the families because in the eyes of the law they were criminals. Some homosexuals hid their relationships from their families because they feared rejection which was based upon prejudice which was reinforced by the law.

Often homosexual men marry to keep up appearances and are forced to live a double life. Frequently these marriages break up causing distress and heartbreak for all concerned. Existing laws encourage prejudices that force homosexuals into destructive situations out of a need to conform. It was pointed out that the Bill should be supported because the law could do nothing to prevent people from being homosexual, and any legislation that strengthened the bond between a homosexual and his family was a positive move.

During the South Australian debate reference was made to homosexuals who lived together being allowed to adopt children. This was not supported by either side of the house.

CHAPTER 3

PUBLIC OPINION ON HOMOSEXUALITY

PUBLIC OPINION SURVEYS

Public opinion surveys are becoming increasingly influential in the shaping of social policies. Advocates of public opinion surveys frequently argue that if the democratic process is to be used to service "the people", then surveys allow the "people's voice" to be heard. Otherwise we only hear from the "vocal minority" of organized interest groups, who may not necessarily reflect the opinions and attitudes of the "silent majority". Critics, on the other hand, argue that at best, surveys provide a partial glimpse of the true situation, and at worst a complete distortion of public attitudes.

While the truth probably lies somewhere between the two extremes, public opinion surveys are becoming frequent. However, as their use becomes increasingly pervasive and influential, some effort needs to be made to understand the limitations and pitfalls of the technology employed. Caution must be exercised in the use of public opinion surveys so that they do not end up shaping rather than measuring public opinion.

Two of the major problems with the use of public opinion surveys are:

(a) the problem of public; and

(b) the problem of opinion.

One of the major problems with the reporting of survey results is the tendency to aggregate a diverse heterogeneous population into an "average" citizen, who responds to a particular issue in a specific way. In reality the community consists of individuals of differing demographic attributes such as age, sex, ethnicity, education level, occupation type, religious beliefs and political persuasions. Their attitudes and views are shaped by their experiences and interactions with other individuals and groups. In respect to the formulation of policy it is important to know how particular groups of people with shared interests think.

In order to understand public opinions, it is necessary to understand how these opinions are formed. Were these opinions formed as a result of personal experience, exposure to the media, community leaders or influential "others"?

For example, a person who has been the victim of a criminal offence would probably have a very different attitude to a person who had had no contact with the criminal justice system. In respect to attitudes towards "victimless" crimes (such as homosexuality, prostitution, etc.) a gay law reformer would probably have a very different perspective to a right-wing religious fundamentalist. It is therefore important that

researchers understand the structure of the society with which they are dealing, because the value of the data gathered is not so much a function of the sophistication of the methodology employed, as it is dependent upon the knowledge, skill and ingenuity of the researcher.

The second problem, that of opinion, lies in the underlying belief system, attitude or motivation of the respondent. Surveys seldom indicate whether the opinion expressed reflects strong beliefs, heavily entrenched attitudes, experience based judgements, "top of the head" response or just a spur of the moment answer. In respect to survey information being used as a basis for changes to public policy it is important to understand and know the underlying issues associated with public opinion.

In analyzing public opinions it is important to know whether views are based on an accurate understanding of the issue or on misconceptions and myths. The decriminalization of homosexuality, for example, is a very emotive issue to some sectors of society. Sometimes its introduction is seen as a crumbling of traditional community values and this generates feelings of fear and a sense of insecurity in some people. Social scientists have developed many techniques to try and tap the subjective worlds of individuals, and to understand their views concerning themselves and others.

The best result that a public opinion survey can yield is an approximation of public opinion. A diverse range of individuals cannot be reduced to a homogeneous "average" citizen, so how closely these approximations match "reality" depends upon how sensitive the survey is to the range of opinions that exist within the community.

This is not to reduce the value of public opinion surveys in the public policy formulation process. An intelligently constructed and executed survey can be very useful to policy planners in that it ensures that they do not lose touch with the public who the policies are meant to serve. When public opinion challenges government policies or programs then two alternatives are available to public sector planners. They can either develop new policy directions or educate and inform the public about the issue at hand.

SURVEYS IN AUSTRALIA

The Morgan Research Group[1] conducted a nationwide survey in 1974, prior to the decriminalization of homosexuality in South Australia, to gauge public attitudes towards the

1 Morgan Research Group, Majority Believe Homosexuality Should Be Legal, Interview conducted September 9/10, 1989, published in The Bulletin, October 10, 1989.

decriminalization of homosexuality. They repeated the survey in 1989 to see if public attitudes had remained consistent over the intervening 15 years. The results showed that the Australian public had indeed changed their views. In 1989 more Australians believed that homosexuality should be legalized and given that the 1974 survey preceeded the widespread concern about the AIDS epidemic, it would appear that the issue of the spread of AIDS is not as high profile a concern within the community as some sectors claim.

The 1989 survey also asked questions that had not been covered in the 1974 survey, which only asked the first question. This gave a slightly broader view of public attitudes towards homosexuality, but no comparison over time. Four major questions were asked:

1. "In your opinion, should homosexual acts in private between consenting male adults be legal or illegal?"

There were only three possible responses, viz "legal", "illegal" or "undecided/don't know". Those who responded "illegal" were then asked why they said that. The format for this section of the question was open-ended and the responses fell into the following categories:

(a) wrong/sinful;

(b) not natural/normal;

(c) diseases;

(d) don't agree;

(e) disgusting/repulsive;

(f) other reasons;

(g) none; and

(h) can't say.

It would have been more informative if those who responded "legal" had been asked why they responded in this manner.

2. "In your opinion should homosexual acts in private between consenting female adults be legal or illegal?"

Again the possible responses were "legal", "illegal" or "undecided/don't know". Also, those who responded "illegal" were

asked why they said that. This time the range of open-ended responses given included:

(a) wrong/sinful;

(b) not natural/normal;

(c) diseases;

(d) don't agree;

(e) disgusting/repulsive;

(f) young people wrong idea;

(g) other reasons;

(h) none; and

(i) can't say.

Once again it would have been informative to know why those who had responded "legal" did so.

3. "In your opinion, should it be illegal to discriminate against a person because they are homosexual or not?"

This is a poorly structured question in that it is ambiguous. The possible responses were "yes", "no" or "can't say". Even though respondents were informed that it was illegal to discriminate against a person because of their sex, race or religion before they were asked this question, this may have served to confuse respondents even more. The inclusion of the "or not" at the end of the question after the word "homosexual" may give the impression that the choice is between homosexual or non-homosexual, rather than legal or illegal. The results for this question were almost evenly divided with the "no's" (not illegal) 47%, marginally ahead of the "yes's" (illegal) 45%, responses. Given that respondents were clearly in favour of legalising homosexuality, it would seem incongruous that they would not support civil rights for homosexuals.

On another level of meaning, because the structure of this question contains two negative word forms, i.e. "illegal" and "not", it is difficult to answer in the affirmative when it includes a negative, viz "yes" (illegal); and alternatively, when the negative "no" (not illegal) indicates a positive, some confusion results. Clearly, the ambiguity of this question would not give a clear indication of public opinion on this issue.

4. "Do you believe homosexual couples should receive the same legal and social rights and benefits as married couples or not?"

Once again, the "or not" is redundant but in this case it does not create the same state of ambiguity as the preceeding question. As to the actual meaning of the question, which really concerns equity, there is no way of gauging the public's knowledge of what the existing status quo is at present. Under the present social security benefit system two single people receive more by way of benefits than a couple does. The questions then arise:

(a) Are people aware of this situation?

(b) If so, to what extent?

(c) If they believe that a homosexual couple should have the same benefits as a heterosexual couple, does this mean that they genuinely believe that the same-sex couples should be treated equally, or think "why should they be better off than heterosexual couples"?

Also, the question covers four distinct areas:

(a) legal rights;

(b) social rights;

(c) legal benefits; and

(d) social benefits.

Respondents may be in favour of homosexual couples having all, some or none of the above rights and benefits. For example, they may be in favour of them having the same legal rights but not the same social benefits. Because the question is not sufficiently disaggregated to allow the respondents a choice of responses, it may be that the response is "no" owing to some particular aspect, but not necessarily all.

The questions on homosexuality were added to an omnibus survey. Morgan Research usually ask respondents a number of questions on a number of topics during the same interview. This sometimes has the effect of reducing the quality of the results, or it does not give a sufficiently "in depth" treatment of important social issues. In this survey, which was conducted Australia wide, a cross-section of 989 men and women aged 14 years and over were surveyed on the weekend of September 9/10, 1989. With these caveats, the results of this survey were compared with the results of the same questions asked in 1974 (prior to widespread concern about AIDS).

RESULTS

The majority of the respondents in 1989 indicated that homosexual acts in private between consenting male adults should be legal. Almost 58 percent supported legalization of homosexual acts, 34 percent opposed and over 8 percent of the respondents were undecided (Table 1). A majority (54 percent) of the respondents in 1974 also supported the suggestion to legalize homosexual acts, but one in five respondents were undecided in their views. However, when the results of the two surveys are compared, it appears that public views in 1989 had polarized. 34 percent of the respondents in 1989 as against 26 percent were against legalizing homosexual acts between consenting adult males.

TABLE 1

Homosexual Acts Between Consenting Males

in Private, 1974 and 1989

Australia

Response	Sept 1974 %	Sept 1989 %
Legal	54	58
Illegal	26	34
Undecided	20	8

Interstate comparison of results of the 1989 survey show that in Western Australia almost 3 out of 4 respondents were in favour of legalizing homosexuality and in Tasmania only 47 percent supported the issue (Figure 1). The Western Australian Parliament decriminalized homosexual behaviour in private between consenting adults in November 1989. Of the Queensland respondents, 56 percent supported legalization and 31 percent opposed the suggestion.

FIGURE 1

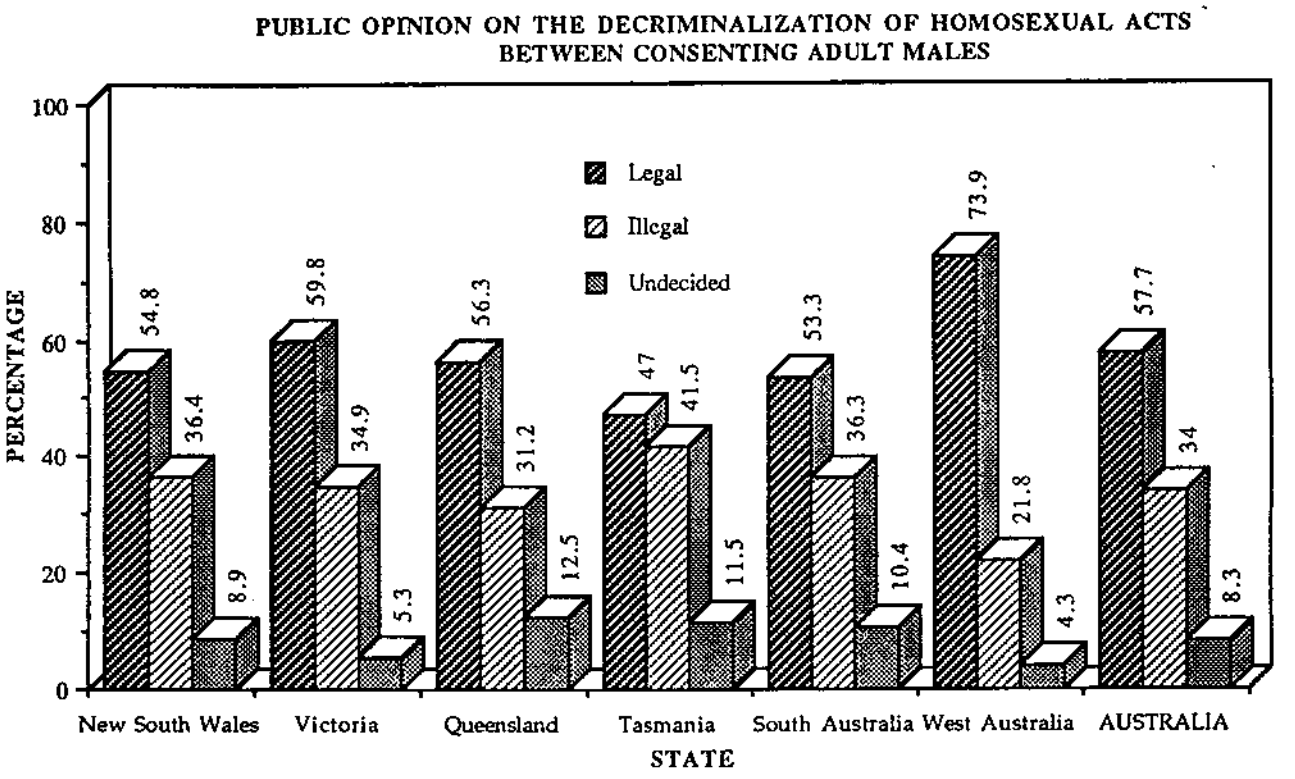


FIGURE 2

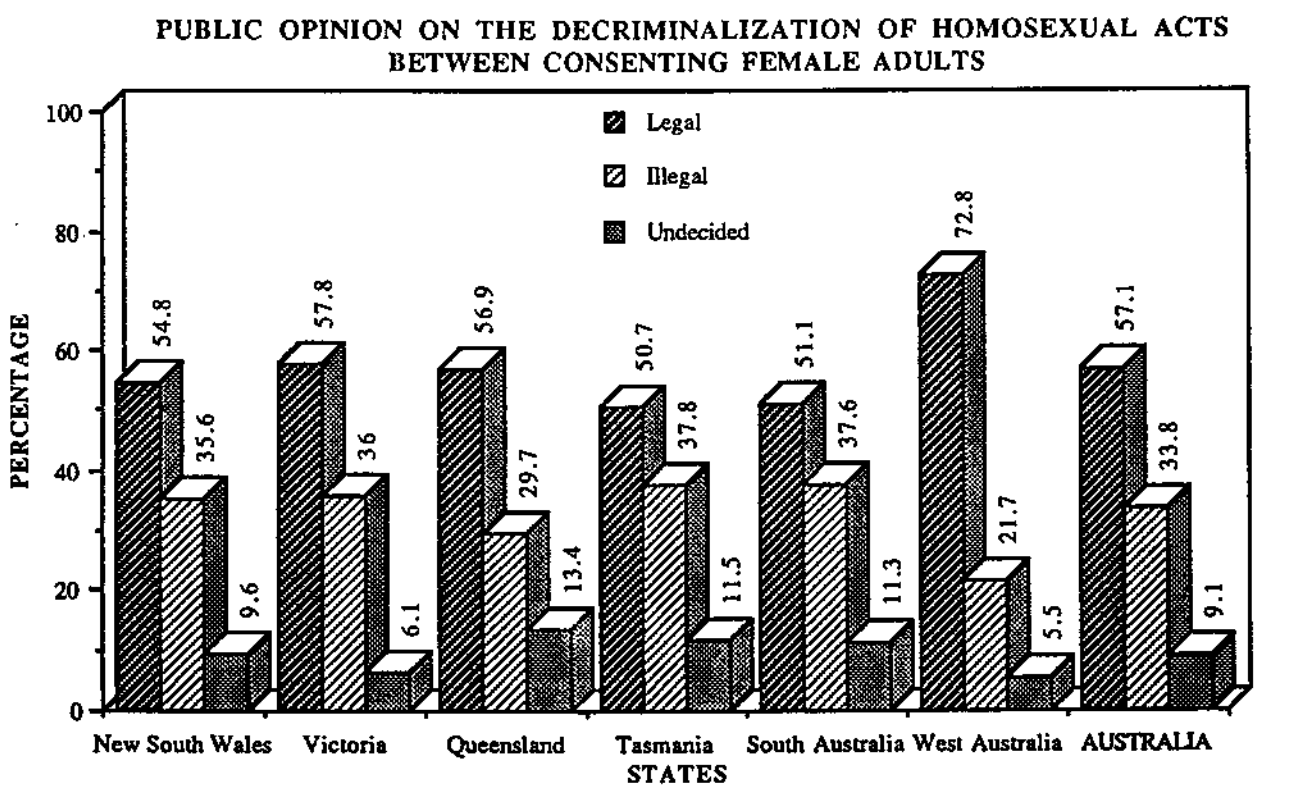


TABLE 2

Opinion on Homosexual Acts by Sex and Age of Respondents

Between Consenting Males

Response	Sex of Respondents		Age of Respondents			
	Men %	Women %	14-24 Years %	25-34 Years %	35-49 Years %	50+ Years %
Legal	54	61	58	64	64	48
Illegal	39	29	33	29	31	41
Undecided	7	10	9	7	5	11
	100	100	100	100	100	100

Between Consenting Females

Response	Sex of Respondents		Age of Respondents			
	Men %	Women %	14-24 Years %	25-34 Years %	35-49 Years %	50+ Years %
Legal	54	60	56	66	64	45
Illegal	37	31	34	28	29	42
Undecided	9	9	10	6	7	13
	100	100	100	100	100	100

The 1974 survey did not seek responses on homosexual behaviour between consenting adult females. But the results of the 1989 survey show that the public view on homosexual acts between consenting females closely resemble that on acts between consenting adult males (Figure 2).

Overall, female respondents, 61 percent, tended to be more favourably disposed towards the legalization of homosexuality than their male counterparts, 54 percent (Table 2). The results reveal that respondents in the 25-49 year age group (2 out of 3) tended to be most liberal in their views and among those 50 years old and over less than half supported legalization.

The survey also revealed that people with higher levels of education appeared to be more liberal in their views towards homosexuality than those with lower levels of education.

In relation to political preferences, supporters of Australian Democrats were more favourably (71%) disposed to homosexual law reform than either supporters of Labor (62%) or Liberal-National (52%).

The way questions 3 and 4 were formulated makes it difficult to see clear views of respondents, the difficulties have been highlighted at the beginning of this section. Response to the question "Should it be illegal to discriminate against a person because they are homosexual or not?" were evenly divided. Overall, 45 percent said 'yes' and 47 percent said 'no' to the question (Table 3). Interstate comparisons showed that 52 percent of the Western Australians and only 36 percent of the Queenslanders answered 'yes' to the question; 55 percent of the respondents from Queensland said 'no' to the question. The results did not reveal any marked differences between the sex and age groups of respondents.

TABLE 3

Discriminate Because They Are Homosexual
by Sex and Age of Respondents

Response	1989 %	Sex of Respondents		Age of Respondents			
		Men %	Women %	14-24 Years %	25-34 Years %	35-49 Years %	50+ Years %
Yes, illegal	45	44	46	43	47	50	41
No, not illegal	47	48	46	49	49	44	46
Can't say	8	8	8	8	4	6	13
	100	100	100	100	100	100	100

It is not known how knowledgable the Australian population is with regard to legal, social, and financial rights and benefits applicable to homosexual couples. Nevertheless, a clear majority, 54 percent, indicated that homosexuals should not receive the same level of rights and benefits as heterosexual couples. Among states, 2 in 3 respondents from Tasmania as against only over 1 in 3 from Western Australia answered 'no' to the question. Interestingly, men and women disagreed substantially on the issue, 61 percent of male respondents and only 46 percent of females said 'no' to the proposition (Table 4). Similarly, people in older age groups, particularly in 50 years and older age group, were against the suggestion more often than those in the younger age groups.

TABLE 4

Homosexual Couples Treated as Married Couples by Sex and Age of Respondents

	Sept. 1989 %	Sex of Respondents Men %	Women %	Age of Respondents 14-24 Years %	25-34 Years %	35-49 Years %	50+ Years %
Yes	36	30	43	46	42	34	28
No	54	61	46	45	49	58	61
Can't say	10	9	11	9	9	8	11
	100	100	100	100	100	100	100

Before concluding this chapter, findings from two research studies, one in Australia and the other in the United States, are presented.

The Australian research was a comparative study of South Australia after the decriminalization of some homosexual acts and Victoria before decriminalization. The two major findings of this study were:

> "that homosexual men in South Australia experience slightly more self-acceptance of their homosexuality than their Victorian counterparts. In line with this, South Australians were significantly less concerned about their homosexuality being known than were the Victorians", and

there was "no increase in negative aspects of homosexuality following decriminalization".[2]

A research study in seven American states found that:

> "Despite the dire predictions of many, the responses indicate that, among other things, decriminalization has had no effect on the involvement of homosexuals with minors, the use of force by homosexuals, or the amount of private homosexual behaviour. Additionally, decriminalization reportedly eased somewhat the problems of the homosexual community and allowed the police to devote more time to the investigation of what generally are regarded as more serious criminal offences."[3]

In summary, although the majority of Australians supported legalizing homosexual acts in private between consenting adults, attitudes towards the status of homosexuals in the Australian society was not as clear cut. The findings of the 1989 survey do not necessarily reveal inconsistency in responses.

There is a strong case for a properly designed survey conducted in Queensland to gauge people's opinions and attitudes. Reform in laws takes time and it is important that the legislators have at their disposal the most up-to-date, accurate, and relevant information on the subject. Similarly, it will be most useful to evaluate the impact of changes in laws.

2 K. Sinclair and M.W. Ross, "Consequences of Decriminalization of Homosexuality: A Study of Two Australian States", Journal of Homosexuality, Vol. 12(1), 1985, p. 125 and 127.

3 G. Geis, R. Wright, T. Garrett, and P.R. Wilson, "Reported Consequences of Decriminalization of Consual Adult Homosexuality in Seven American States", Journal of Homosexuality, Vol. 1(4), 1976, p. 419.

CHAPTER 4

COMPARATIVE LEGISLATION

Six Australian jurisdictions have decriminalized certain aspects of homosexual acts between consenting adults. It is the purpose of this chapter to provide a comparative analysis of legislation relating to homosexuality in these jurisdictions.

The move to decriminalize homosexuality is not unique to Australia. The United Kingdom decriminalized homosexuality in 1967 following the report of the Committee on Homosexual Offences and Prostitution, 1957. Subsequently some other countries have also reformed laws that relate to homosexual activity. Besides laws of the United Kingdom this report also contains specific provisions from the laws of Canada, California and New Zealand.

SOUTH AUSTRALIA

CRIMINAL LAW CONSOLIDATION AMENDMENT ACT 1972
CRIMINAL LAW (SEXUAL OFFENCES) AMENDMENT ACT 1975

All reforms were introduced during the Labor Government of Premier Donald Dunstan. South Australia was the first Australian jurisdiction to decriminalize homosexuality.

Initial reform of the criminal law in its application to homosexual practices was achieved by the Criminal Law Consolidation Amendment Act 1972. A new section 68a was inserted to provide a defence to a male charged with an "unnatural offence" that the offence was committed in private with an adult male who had given consent.

The amendment was introduced into the Legislative Council as a Private Members' Bill. Voting on the Bill in both houses was according to conscience.

On 19 September 1973, the then Attorney-General, introduced the Criminal Law (Sexual Offences) Amendment Bill into the Legislative Assembly in his capacity as a Private Member. The purpose of the Bill was to extend the 1972 reform by removing from the catalogue of sexual offences any which discriminated against males purely on the basis of homosexuality. Voting was according to conscience. The Bill was defeated in the Legislative Council by one vote. In 1975, the same member again introduced a Criminal Law (Sexual Offences) Amendment Bill as a Private Members' Bill and this time it was passed in both houses.

The Criminal Law (Sexual Offences) Amendment Act 1975 abolished the crime of sodomy, and rewrote the definitions of rape, carnal knowledge and prostitution to include male offenders and victims.

Substantive Provisions: Initial Reform (See Criminal Law Consolidation Amendment Act 1972).

(1) Section 68a (1) where a male person is charged with an offence that consists of the commission of a homosexual act, it shall be a defence for that person to prove that the homosexual act was committed with another male person, in private, and that both he and the other male person consented to the act and had attained the age of twenty-one years.

(2) A homosexual act shall not be held to have been done in private if it is done:

(a) when more than two persons take part in or are present at the commission of the act; or

(b) in any lavatory to which the public have or are permitted to have access, whether free of charge or otherwise.

(3) A homosexual act includes:

(a) an act of buggery between two male persons; or

(b) an act of gross indecency between two male persons.

Following the processes of reform, the Criminal Law (Sexual Offences) Amendment Bill as passed in 1975 had the purpose of extending the 1972 reform by removing from the catalogue of sexual offences any which discriminated against males purely on the basis of homosexuality. The 1975 Act to amend the Criminal Law Consolidation Act (1935-1974) and the Police Offences Act, (1953-1974) was assented to 2nd October, 1975.

Section 3 of the Amending Act starts by amending the principal Act by striking from the heading "Rape, defilement and abduction of women and girls" the words "of women and girls". Clearly the intent of the Act is to make it gender neutral.

Section 4 of the Consolidation Act adds the following definitions:

"carnal knowledge" includes penetratio per anum of a male or female person;

"common prostitute" includes any male person who prostitutes his body for a fee or reward;

"rape" includes penetratio per anum of a male or female person without his or her consent.

In section 8 and 9 of the Amending Act, the word "female" has been struck out and in lieu thereof, the word "person" has been inserted.

In section 11 the word "School Master" has been struck out and inserted in lieu thereof is the passage "School Master or School Mistress" again the word "female" is struck out and in lieu thereof is inserted the word "person".

In section 13 of the Amending Act, section 55 of the principal Act was gender neutralized to:

> Defilement of person between thirteen and sixteen years of age, and of idiot person or child.

ABOLITION OF THE CRIME OF SODOMY

Section 68a of the principal Act (that which provided the consenting adult in privacy defence to the offence of commission of a homosexual act) was repealed by section 29 of the 1975 Amendment Act. Section 29 also has the effect of inserting in its place:

> 68a The law relating to unnatural offences shall be as prescribed by this Act and any such offence created under any other enactment or at common law is abolished.

Section 30 of the Amending Act has the effect of retaining the offence of buggery with an animal and the offence of attempting to commit buggery with an animal.

The South Australian Legislation assented to in 1975 represents a pragmatic and working attempt to reform homosexual law. It is pragmatic in the sense that not only does it abolish the traditional homosexual crimes of sodomy, and indecent dealing but at the same time it gender neutralises sexual offences and offences relating to prostitution.

AUSTRALIAN CAPITAL TERRITORY

LAW REFORM (SEXUAL BEHAVIOUR) ORDINANCE 1976

The Crimes Act, New South Wales, in its application to the Australian Capital Territory, was amended by the Australian Capital Territory Assembly by the Law Reform (Sexual Behaviour) Ordinance 1976 with respect to the crimes of buggery (section 69, section 80) and indecent assault on males (section 81). It is a defence to these crimes that the act was committed in private with adult consent. Section 3 of the Ordinance provides:

> Subject to this Ordinance, a person who, with the consent of another person (whether of the same or different sex) and in private, commits an act of a sexual nature upon or with that person is not, by reason only of the commission of that act, guilty of an offence.

These offences are still offences if committed in public.

Section 2(3) provides:

> For the purposes of this Ordinance, an act done in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise, shall be taken to have been done otherwise than in private.

The age of consent for both males and females is 18 in the Australian Capital Territory, but there is a honest and reasonable mistake of fact defence if the accused party thought the other party had attained the age of 18 years and had in fact attained the age of 16 years.

Section 4 provides:

(1) The consent of a person who has not attained the age of 16 years is not effective for the purpose of section 3 or section 5.

(2) The consent of a person who has attained the age of 16 years but has not attained the age of 18 years is not effective for the purpose of section 3 or section 5 unless the defendant proves that he had reasonable grounds for believing, and did believe, that the first-mentioned person had attained the age of 18 years.

(3) The consent of a person is not effective for the purpose of section 3 or section 5 if the consent is induced by means of a threat, by force, by means of a false pretence or representation or by the use of intoxicating liquor or a drug.

(4) The consent of a person of unsound mind is not effective for the purpose of section 3 or section 5 if the person to whom it is given knows, or has reason to suspect, that the first-mentioned person is of unsound mind.

The burden of proof remains at all times on the Crown. This is ensured by section 5 of the Ordinance which provides:

> When a person is charged with an offence against section 79, 80 or 81 of the Crimes Act, the court shall not find that the offence has been established unless it is proved:
>
> (a) that the person upon or with whom the act alleged to constitute the offence was committed did not give an effective consent to the commission of the act;
>
> (b) that the person was related to the defendant; or
>
> (c) that the act alleged to constitute the offence was committed otherwise than in private.

VICTORIA

CRIME (SEXUAL OFFENCES) ACT 1980

The Crimes (Sexual Offences) Bill 1980 was introduced into the Legislative Council by the Attorney-General, the Honourable Haddon Storey, on 12 November 1980. Voting was along party lines with Liberal and Labor members voting for the Bill and the National Party members voting against. As with the 1975 South Australian reforms, the Act sought to place males and females on an equal footing with regard to sexual offences. The Bill was passed into law as the Crimes (Sexual Offences) Act 1980.

Specific attention should be drawn to the following:

(1) PREAMBLE:

The preamble to the Victorian Act spells out the reasoning behind the passing of the Act. The rationale sets out that the Act is consistent with the following principles:

(a) The desirability for the law to protect all persons from sexual assaults and other acts of coercion;

(b) The desirability for the law to protect persons from sexual exploitation especially exploitation by persons in positions of care, supervision and authority;

(c) The undesirability of the law relating to sexual behaviour to invade the privacy of the people of the state more than is necessary to afford them protection;

(d) The desirability for the law to protect and otherwise treat men and women so far as possible in the same manner;

(e) The abolition of obsolete rules of law; and

(f) Parliament's intention not to condone immorality.

(2) SUBSTANTIVE PROVISIONS:

The Act enacts the following substantive provisions:

(a) The redefinition of rape to include the introduction of the penis or another object into the vagina, the anus or the mouth of another person (whether male or female) without his or her consent.

(b) The offence of indecent assault (section 44, sub-section 1 and 2) applies equally to assaults upon male and female persons by male or female persons; discrimination on the basis of either gender or sexuality being thereby eliminated.

(c) Section 44, sub-section 3 provides that the consent of the person assaulted is irrelevant except in 3 circumstances:

(i) where the accused was or believed on reasonable grounds that she/he was married to the person;

(ii) the accused believed on reasonable grounds that the person was of or above the age of 16 years; or

(iii) the accused was not more than 2 years older than that person.

These defences are important in that they provide defences to offences in situations of mistake of fact related to marital status or age. In addition, section 44 (3)(c) envisages situations where people of similar age are involved in sexual acts where sexual exploitation is most probably absent.

(d) Section 45 sets out the offences of rape, penalties for which are the same for both males and females.

(e) Section 47 of the Act sets out sexual offences against children under the age of 10 years involving acts of sexual penetration. Neither the sex of the offender or of the victim is relevant nor is the presence of consent.

(f) Section 48 sets out offences involving the act of sexual penetration with a child above the age of 10 years but under the age of 16 years. For the purposes of this section, the penalty is increased if the victim is either generally or at the time the offence is committed, under the care, supervision or authority of the offender. Additionally, for the purpose of section 48 consent is relevant if the accused either believed on reasonable grounds that the person was of or above the age of 16 years or that the accused was not more than 2 years older than the person or if the accused reasonably believed that he was married to the person on whom the offence was committed.

(g) Section 49 makes it an offence to take part in an act of sexual penetration of a male or female person above the age of 16 but under the age of 18 years.

Increased penalties are provided for where the person assaulted was under the care, supervision or authority of the offender. Consent is no defence except where, in the same way as previously explained:

(i) the accused believed on reasonable grounds that the person was of or above the age of 18 years; or

(ii) the person assaulted had previously willingly taken part in an act of sexual penetration with a person other than the accused; or

(iii) the accused was not more than 5 years older than the person; or

(iv) the accused believed on reasonable grounds that he was married to the person with or upon whom the offence was committed.

As in the other sections where these defence provisions are set out, the Act specifically allows for both mistake of fact and sexual experimentation between persons of roughly the same age.

(h) Section 50 sets out the offence of gross indecency with, by or in the presence of a person under the age of 16 years. The offence is aggravated in circumstances where the victim was at the time of the offence under the age of 16 years and either generally or at the time of the commission of the offence under the care, supervision or authority of the offender, or where the offender has been previously convicted of a similar offence. In the same way as the previous section, section 50 sets out the defence of consent in circumstances of mistake of fact or similar age.

(i) The Act goes on to amend sections 51 and 52 of the Crimes Act dealing with acts of sexual penetration with intellectually handicapped persons and the crime of incest. In both these sections references to men and boys, and women and girls have been replaced with the word person or persons. In this way these two sections are further examples of the non-sexist, anti-discriminatory nature of the Victorian Legislation.

(j) Referring to section 11 of the Amending Act it should be noted that an offence has been created in respect to soliciting in public places for the purpose of prostitution or, alternatively, for immoral sexual purposes. This section provides for a penalty of $500.00 or imprisonment for one month for any person found guilty of such an offence.

(k) Section 18B makes it clear that the Act in regulating prostitution provides for both male and female prostitutes equally. Section 18C makes it an offence for a person to solicit or encourage another to take part in an act of sexual penetration or gross indecency with him/her or another person, where the second mentioned person is under the age of 18 years or under the care, supervision or authority of the first person.

(1) Section 12 of the Victorian Vagrancy Act includes male as well as female prostitution, and the term "brothel" includes a place resorted to by people of both sexes or either sex for the purpose of engaging in prostitution.

Accordingly, it can be seen that the Victorian Act Amendments reconcile:

(i) freedom of sexuality and sexual expression;

(ii) anti-discrimination;

(iii) for the protection of children from sexual exploitation, in particular by people in positions of authority over them; and

(iv) freedom of sexual experimentation by adolescents.

NORTHERN TERRITORY

CRIMINAL CODE (1983)

The Criminal Code (1983) governs Northern Territory law with respect to offences against morality. This includes Carnal Knowledge Or Gross Indecency Between Males In Public (section 127), and Carnal Knowledge Or Gross Indecency Between Non-Adult Males In Private (section 128), both of which are crimes. Some concern was expressed by opposition members during debate on the passage of the code that these sections did not go as far as South Australian or Victorian Acts, in terms of ameliorating the criminality of being homosexual.

DEFINITIONS

"Adult" means a person of or over the age of 18 years.

"Carnal Knowledge" means sexual intercourse, sodomy or oral sexual intercourse and it occurs as soon as there is penetration.

THE SUBSTANTIVE LAW

Homosexual offences are found in Division 2 - Offences Against Morality

Section 126 **DEFINITIONS**

In this division:

> "in private" means with only one other person present and not within the view of a person not a party to the act and "in public" means with more than one other present or within the view of a person not a party to the act;
>
> "unlawful" or "unlawfully" means that the parties to the act are not husband and wife.

Section 127 **CARNAL KNOWLEDGE OR GROSS INDECENCY BETWEEN MALES IN PUBLIC**

(1) Any male who in public or in any public place:

> (a) has carnal knowledge of a male; or
>
> (b) commits any act of gross indecency with a male,
>
> is guilty of a crime and is liable to imprisonment for seven years.

(2) If one of the male persons involved in the crime is under the age of 14 years, any other offender who is an adult is liable to imprisonment for 14 years.

Section 128 **CARNAL KNOWLEDGE OR GROSS INDECENCY BETWEEN MALES IN PRIVATE**

(1) Any male who in private -

> (a) has carnal knowledge of a male who is <u>not an adult</u>; or
>
> (b) commits any act of gross indecency with a male who is <u>not an adult</u>,
>
> is guilty of a crime and is liable to imprisonment for seven years.

The underlining has been added to highlight that the Northern Territory approach to reform of consensual homosexual acts in private has been to create an offence with a "not an adult" element. Thereby making homosexual acts by consenting adults in private an exception in what is otherwise proscribed behaviour.

Sub-section (2) provides:

> If one of the males involved in the crime is under the age of 14 years, any other offender who is an adult is liable to imprisonment for 14 years.

(3) It is a defence to a charge of a crime defined by this section to prove that the accused person believed, on reasonable grounds, that the other male was an adult.

Section 133 GROSS INDECENCY IN PUBLIC

> Any person who in public and in a public place knowingly commits any act of gross indecency is guilty of a crime and is liable to imprisonment for two years.

In section 134 Incest by Male and section 135 Incest by Adult Female, there is a distinction drawn between the offence of incest as committed by a male where the term of imprisonment is established at 14 years and that for adult females where the term of imprisonment is 7 years. The continued sustainability of such a differentiation in sentencing based on gender must be questioned in light of notions of equality. An act of incest can be the act of two consenting adults and the degree of criminality should be the same irrespective of gender.

It is of note that the law of the Northern Territory as was in force at 1st June 1978 in the CRIMINAL LAW CONSOLIDATION ACT AND ORDINANCE, homosexual offences were defined in the traditional style:

> "Unnatural Offences": whoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned for life with hard labour.

Perhaps it could be said that the Northern Territory's treatment of homosexual law reform is politically pragmatic in the sense that it provides a defence to offences against morality where the act of carnal knowledge or gross indecency is carried on between adults in private. The Northern Territory Criminal Code does not really take the matter further than that. The Code is not gender neutral in its treatment of the sexes. This is amply demonstrated in the unequal treatment of males and females in the crime of incest.

The definition of "privacy" and "in private" is a strict one.

"in private" means:

> with only one other person present and not within the view of a person not a party to the act.

Technically, with such a definition of "in private" it is virtually impossible for consenting adults to guarantee they are effectively "in private"; if they are being viewed (even surreptitiously) by a third party they are not in private. **Such a definition of "in private" does not obviate the potential for police entrapment in section 128 of the Northern Territory Code.**

It is quite possible (and this definition of "in private" facilitates the potential) for a police officer or any other third party to view a homosexual act - through the window of a private house or even from a distant balcony or with a telescope, and the sexual act is no longer "in private". The definition of "in public" is the opposite of "in private".

Therefore, by this definition of "in private" and "in public" sexual acts could foreseeably and conceivably take place in what is otherwise a private place and still be proscribed sexual behaviour.

The definition of "carnal knowledge" is sufficiently wide to cover anal and oral sex but does not include any other form of penetration such as digital penetration or penetration by inanimate objects.

NEW SOUTH WALES

CRIMES ACT (1902)
CRIMES ACT AMENDMENT ACT (1984)

> "Many will condemn the Bill because it does not go far enough. Many will condemn the Bill because it goes too far. For those within the first category, my answer is that half a loaf is better than none, and that this Bill represents a genuine attempt to produce a more enlightened approach and compassionate understanding to those within our community who engage in homosexual relationships. To the latter group, it must be said that if they are not aware of the homosexuality in our committee, and of the undignified, unfair and prejudicial effects upon tens of thousands of decent people resulting from the operation of our present laws, they are either blind, or blindly discriminate. So, put simply, the Bill is a small step to homosexual law reform."
>
> **N.K. WRAN, Q.C., Premier of New South Wales introducing the Crimes (Amendment) Bill 1984.**

The New South Wales Legislation was modelled on the South Australian provisions. In fact, the Legislation is not as far reaching as that in force in South Australia or, for that matter, in Victoria. What it does represent, is a "rather conservative reform designed to establish the principle that sexual activity between consenting males of or over the age of 18 years should be decriminalized".[1]

1 Legal Service Bulletin, June 1984, "Homosexual Law Reform: N.S.W. - Who is Satisfied?", Ian McLintock, John Andrews, 138.

HISTORY OF REFORM

The New South Wales Bill represents the fourth major attempt at reforming the law relating to homosexuality since 11th November 1981. Three Private Member's Bills had been introduced in the preceding 2 1/2 years. The second, arose directly out of the anticipated failure of the first. The third was introduced into the Legislative Council on 18th February 1982 by Mr. Barry Unsworth. All these attempts were unsuccessful.

Four issues proved to be critical in homosexual law reform in New South Wales, no doubt the same will need to be addressed in Queensland.

(1) The age of consent to homosexual acts.

(2) Whether a distinction should be drawn between public and private homosexual conduct.

(3) Whether a separate offence of soliciting should be retained.

(4) Whether a limited defence should be available for a homosexual mistaking his partner's age as being above the age of consent.[2]

In relation to the age of consent, the first (Petersen) Bill proposed an age of consent of 16. This would have brought about equality between the sexes as to the age of consent in the **Crimes Act (1900) New South Wales**. On the other hand, the Egan and Unsworth Bills reflect the view that an age of consent of 16 was unacceptable.[3]

In relation to the public/private aspect of homosexual conduct - the issue is whether to adopt the English approach of generally outlawing homosexual conduct but exempting acts in private between consenting adults (Unsworth). The alternative proposal was to generally abolish homosexual offences and to deal with public homosexual conduct as being criminal only if it can be shown to be within the present boundaries of offensive behaviour (Petersen). **In neither South Australia nor Victoria is the distinction retained between public or private homosexual acts.** Closely related to the public/private issue, was the question of whether a specific offence of soliciting for homosexual purposes should be retained. This issue was raised by Mr. Tim Moore, who sought to introduce an amendment to the Unsworth Bill relating to soliciting of minors in public.[4]

2 Op cit, p. 138.

3 Ibid, p. 138.

4 Ibid, p.139

Finally a defence of reasonable mistake as to age was proposed in the Petersen Bill, but rejected in the Unsworth Bill. The Petersen argument was that all defences available to a charge of carnal knowledge of a girl under 16, should be equally available to a similar charge against a male for underaged homosexual conduct.[5]

New South Wales law on homosexuality were ultimately reformed by the introduction of the Crimes (Amendment) Bill 1984 introduced on the 10th May, 1984. This Bill sought to decriminalize homosexual behaviour between consenting adults in private who are 18 years or over. This Bill was passed by both houses of Parliament and was assented to on the 31st May, 1984.

LEGISLATIVE CHANGES RE HOMOSEXUAL LAW REFORM

The Substantive Provisions

It should be noted, that the definition of sexual intercourse which appears in section 61A of the Crimes Act (New South Wales) introduced in 1981, is that which the Law Reform Commission of Tasmania urged be adopted. It recognises the seriousness of other forms of penetration and removes the differentiation based on gender in current Queensland sex offences. The definition of sexual intercourse as is provided in section 61A of the Crimes Act (New South Wales) adequately covers all forms of sexual activity, vaginal, anal, and oral and can be applied equally to males and females. This definition of sexual intercourse is discussed adequately in the appendix to this paper that relates to Tasmanian law reform. It should be noted that section 62 then provides a definition of carnal knowledge. Section 62 (2) - inserted by the Crimes Act Amendment Act (1984) says:

> "In this Act carnal knowledge includes - sexual connection occasioned by the penetration of the anus of a female by the penis of any person, or the continuation of that sexual connection."

It is interesting to note that the Crimes Act in New South Wales provides for both a definition of "sexual intercourse" and a definition of "homosexual intercourse". The separate definition of homosexual intercourse is used in relation to a new range of homosexual offences where one of the males is under 18 introduced in 1984 and discussed later in this section.

Section 78G inserted by the Crimes Act Amendment Act (1984) defines "homosexual intercourse" as being:

(a) sexual connection occasioned by the penetration of the anus of any male person by the penis of any person;

5 Op cit, p. 139.

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another male person; or

(c) the continuation of homosexual intercourse as defined in paragraph (a) or (b).

The need for two separate definitions of, firstly sexual intercourse, and secondly homosexual intercourse should be questioned. Homosexual intercourse is adequately covered by the definition of sexual intercourse as is provided in section 61A of the Crimes Act. This definition could just as simply be used in the still proscribed aspects of homosexual behaviour. Use of such terms as "the penis of a person" is really superfluous.

Under the Crimes Act Amendment Act it is still an offence for a male person to have homosexual intercourse with a male person under the age of 10, such offence liable to penal servitude for life. It is still an offence for a male person to attempt to have homosexual intercourse with a male person under the age of 10 or to commit any form of assault on such male person with intent, such offence to be liable to penal servitude for 14 years. In the case of homosexual intercourse with a male between the ages of 10 and 18 it is still an offence but a defence of honest and reasonable mistake of fact applies.

THE MAIN FEATURES AND EFFECTS OF THE CHANGES

The major effect of the legislation is to abolish the crimes of buggery and indecent assault on males where both parties are over the age of 18 years. Non-consensual acts in this category are now exclusively dealt with by the previously degendered sexual assault provisions in section 61 of the Crimes Act.[6]

These sections had been previously amended in 1981. Section 61 provides for four categories of sexual assault where consent is absent, and defines sexual intercourse to include anal, oral and vaginal intercourse, cunnilingus and penetration with objects.[7]

The 1984 Act creates new offences in relation to homosexual intercourse and acts of gross indecency where one of the males is under 18. Homosexual intercourse is defined to include, as well as anal intercourse, sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another male person. Acts of gross indecency are not defined in the Act.[8]

6 Op cit, p. 139.

7 Ibid, p. 139.

The following new offences for which consent is no defence and penalties were created:

> Homosexual intercourse with a male under 10 - life penalty (Section 78J);
>
> Homosexual intercourse with a male aged between 10 and 18 - 10 years (Section 78K);
>
> Homosexual intercourse with an idiot or imbecile - penalty 5 years (Section 78M);
>
> Homosexual intercourse with a male between 10 and 18 by a school master, teacher, father or step-father - penalty 14 years (Section 78N);
>
> Committing an act of gross indecency on a male under the age of 18 - imprisonment for 2 years (Section 78Q(1)).[9]

The effect then of the 1984 New South Wales Legislation is apparently to act in concert with the 1981 Amendments of section 61 of the Crimes Act to provide that now the New South Wales Statutory regime works in the following way:

> Per section 61: the definition of sexual intercourse has been widened to include homosexual intercourse. Non-consensual acts of buggery and indecent assault are dealt with under this section.
>
> Per the 1984 Amendments: provision is now made for new offences by males with males under the age of 18 years.

In addition to these new offences, the definition of carnal knowledge (which applies to girls under the age of 16) is widened to include both anal and vaginal penetration by the penis of any person (see section 62(2)). Consent remains totally irrelevant in carnal knowledge offences where the girl is under 14 and is only one element where the girl is aged between 14 and 16.

Reform of the law proscribing homosexual conduct in New South Wales has left the law in the position now that homosexual acts between consenting adults are no longer illegal. The age of consent is 18. Considerable legislative debate occurred on the age of consent prior to the amendment of the Crimes Act.

> "The age of consent issue was the rock on which all previous attempts to reform the law in New South Wales had founded.... Mr. Wran, in introducing the Legislation while stating that - "it would be an absurdity for the issue of

8 Op cit, p. 139.

9 Ibid, p. 139.

age to be a barrier to reform", acknowledged that - "persons supporting an age of consent of 16 did so with conviction and "some may think with considerable logic". However, he openly acknowledge the age of 18 was a necessary compromise to ensure passage of the Bill."[10]

WESTERN AUSTRALIA

LAW REFORM (DECRIMINALIZATION OF SODOMY) ACT (1989)

This Act represents the most recent attempt to reform the law as it pertains to homosexuality in Australia. The first attempt at homosexual law reform occurred on 27 November 1973 when the Attorney-General, T.D. Evans, introduced a Private Members' Bill into the Legislative Assembly, where it was carried by 28 votes to 17. However, the Legislative Council voted 15 - 8 to refer it to a Parliamentary Joint Committee which later evolved into the Royal Commission appointed to enquire into and report upon matters relating to homosexuality.

The next attempt, also by way of a Private Member's Bill was on 19 October 1977. However, it was defeated in the Legislative Assembly by 27 votes to 24.

The third attempt was on 10 April, 1984 by the Honourable Robert Hetherington with the introduction of a Private Members' Bill into the Legislative Council. It was defeated 18 votes to 15.

The successful attempt occurred on 1 October 1989 as a result of two Private Members' Bills being introduced into the Legislative Council by the Honourable John Halden. The first was the **Criminal Code Amendment (Decriminilization of Homosexuality) Bill, 1989**, which as a result of amendments in committee became the **Law Reform (Decriminalization of Sodomy) Bill, 1989**. This latter was passed by both houses of Parliament and assented to on 19 December 1989. The change in title of the Bill reflects also a change of emphasis.

It is to be noted that the Western Australian Act has been criticized by the Queensland Gay Law Reform Association. The Queensland Gay Law Reform Association is of the opinion that the Western Australian model is entirely unacceptable for Queensland. This body has been vociferous in its condemnation of Western Australian Legislation.

10 Op cit, p. 139.

THE SUBSTANTIVE LAW

By way of brief outline the salient features of the Act are as follows:-

Preamble:

The preamble to the Western Australian Law Reform (Decriminalization of Sodomy) Act is as follows:

> "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 action, in removing any criminal penalty for sexual acts in private between persons of the same sex, wish to create a change of 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 life-style and disapproves of instrumentalities of the state so doing: be it before enacted by the Parliament of Western Australia:...."

The potential for uncertainties in interpretation in this preamble is obvious. The first clause of the preamble states that sexual acts between consenting adults in private ought not to be regulated by the Criminal Law. The remainder of the preamble imputes moral condemnation of those same sexual acts.

Principles of statutory interpretation suggest that in the interpretation of the Act by a court (and indeed by the public at large) the court must read the Act as a whole, including the preamble. Hence, if an ambiguity should arise in the interpretation of the legislation, a preamble such as this could lead to a reading down of the legislation in a way not intended by Parliament. It should also be noted that preambles in legislation usually do not refer to policy matters and are generally restricted to a factual account of the legislation. Accordingly, the preamble is not in accordance with usual statutory drafting principles in Queensland.

The Criminal Code of Western Australia previously provided for three offences relating to homosexuality. They were as follows:-

Section 181 - Unnatural Offences
Section 183 - Indecent Treatment of Children Under 14 years
Section 184 - Indecent Practices Between Males

While there have not been prosecutions under these sections in Western Australia for many years (unlike the situation in Queensland), the existence of the laws themselves was widely recognized as driving high risk behaviour underground and discouraging persons from presenting themselves for AIDS testing. Equally, it was recognized that there is little evidence that such laws play a significant role in deterring high risk homosexual practices. The 1989 Act repeals those sections of the Code which made it unlawful to engage in homosexual activity between men, it also amended some other sections of the code which previously related to women and girls extending them to men and boys.

Section 181 was repealed and replaced with:

Carnal knowledge of animal -

"181. Any person who has carnal knowledge of an animal is guilty of a crime and is liable to imprisonment for 7 years."

Section 183 was repealed, Section 184 was repealed and replaced with:

"184. Any male person who in public commits any acts of gross indecency with another male person or procures another male person to commit in public any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person in public is guilty of a crime and is liable to imprisonment for 3 years."

AGE OF CONSENT

Section 10 and 11 of the Act provide that in relation to certain offences regarding young people, the age of consent is eighteen (18) for <u>women</u>, and twenty-one (21) for <u>men</u>. This belies the fact that young people, whatever their sexual orientation, begin to experiment sexually at an early age and many are well experienced sexually by their late teens. This is also a period when norms of sexual behaviour and protective behaviour are learnt. Therefore it is contrary to medical/psychological

evidence, philosophical arguments and prevailing social norms in relation to the equality of the sexes to provide a different age of consent depending on gender.[11]

PUBLIC POLICY

The other most significant section of the Act are sections 23 and 24 which provide that:-

23. It shall be 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.

24. It is unlawful to promote or encourage homosexual behaviour as part of the teaching in any primary or secondary educational institution.

These provisions have been widely criticized as being uncertain and confusing, they also could have undesirable implications for public health programmes.

MISTAKE OF FACT

It should be noted that the defence of consent based on mistake of fact is very narrow in the Western Australian provisions. In relation to the Amending Act section 9 (Amending section 186 of the Code) it is a defence to any charge brought under this section if it can be proven that the accused person believed on reasonable grounds that, in the case of a female ,she was of or above the age of 16 years and in the case of male, that he was of or above the age of 21 years. Indeed, even more prohibitively, section 10 of the Amending Act (Amending section 187 of the Code) provides that it is a defence to a charge of any of the offences defined in that section with regard to a female child only to prove that the accused person believed on reasonable grounds that the said child (female child) was of or above the age of 16 years. There is no similar defence in the case of a male child.

Section 189 of the Code as amended makes it an offence for a person to unlawfully and indecently deal with a person who:

1. is under the age of 16; or

2. is seriously mentally disabled; or

3. is under the age of 17 where the accused is a guardian, employer or teacher.

11 McCary, J.L., Human Sexuality, D. Van Nostrant Company, New York, 1973.

The section goes on to make it an offence for a male person to unlawfully and indecently deal with another male person who is under the age of 21. Under Sub-section 4 some additional protection is given to the accused person who reasonably mistakes the age of a consenting child, but that protection is afforded only where the person is a female child under the age of 16 years.

TASMANIA

CRIMINAL CODE ACT (1924)

Reform of the law as it pertains to homosexuality was attempted unsuccessfully in Tasmania in line with the recommendations contained in the Tasmanian Law Reform Commission Report on rape and sexual offences presented to the Tasmanian Parliament in 1982.

The Tasmanian Law Reform Commission recommended sweeping changes to the structure of sexual offences in the Tasmanian Code, including the removal of the "not his wife" proviso to the offence of rape, gender neutrality for sex offences and the removal of sodomy and indecent practices between male persons from the Code. Removal of homosexual offences from the Criminal Code was rejected by the Tasmanian upper house. Decriminalization of homosexuality was not politically acceptable in Tasmania at that time.

Other than those recommendations that relate to homosexuality, the recommendations of the Law Reform Commission were largely adopted in the Criminal Code Amendment (Sexual Offences) Act 1987. However, the "ladder" of sexual offences that the Commission strongly urged, and the definite change in emphasis it would create, was not.

The definition of carnal knowledge was substituted for one of "sexual intercourse" to reflect the gravity of other forms of sexual penetration. The definition of rape was amended to allow for rape in marriage, and sexual offences were gender neutralized. The only reform of section 122, (the principal provision used against homosexuality) was a change in terminology from "unnatural carnal knowledge" to one of "unnatural sexual intercourse".

Although the wider concept of "sexual intercourse" is commendable from the point of view of giving proper weight to the crime of rape (reflecting the gravity of other forms of penetration), and when coupled with the new definition of "consent" changes the emphasis of the criminality of that offence from a crime of passion to one of violence, the new concept of sexual intercourse does nothing to ameliorate the criminality in an act of sodomy, when it is prefixed by the word "unnatural" - as in section 122 of the Tasmanian Criminal Code. What constitutes "unnatural" is

still subject to interpretation and imposes objective moral judgements on individuals and the expression of their sexuality.

No reform of section 123 of the Tasmanian Criminal Code "indecent practices between male persons" was attempted. The net effect being that, despite the reforms of other sexual offences in Tasmania, the moral condemnation of homosexuality was not removed from the Tasmanian Criminal Code by the 1987 Act.

The relevant offences are contained in Chapter XIV of the Tasmanian Criminal Code, "Crimes Against Morality", section 122 provides for a charge of unnatural sexual intercourse: any person who:

(a) has sexual intercourse with any person against the order of nature;

(b) has sexual intercourse with an animal; or

(c) consents to a male person having sexual intercourse with him or her against the order of nature, is guilty of a crime.

Section 123, Charge: Indecent practice between male persons provides:

- any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

No further reform has been attempted. However, the "Accord" signed between the Green Independents and the ALP provides for the decriminalization of homosexual acts between consenting adults in <u>private</u>. This accord was signed on the 29th May 1989.

We are at present unaware of any draft legislation to fulfil the requirements of the accord.

The current age of consent is 17 in Tasmania.

Much of the Law Reform Commission Report No. 31 <u>Parliament of Tasmania Report and Recommendations on Rape and Sexual Offences</u> is reproduced in the appendix to this report. This report is dated 1982 and was handed down on the 9th day of December. The Tasmanian Commission's report is a most useful analysis of the "State of Play" in homosexual law reform in Australia up until the date of publication and the recommendations and approach adopted by the Commission to the reform of sexual offences is most useful. The rationale adopted in Tasmania in 1982 should be of interest in Queensland today. Such a comment is particularly pertinent when it is remembered that the Tasmanian and Queensland Criminal Codes are very similar.

OVERSEAS LEGISLATION
ENGLAND AND WALES

THE SEXUAL OFFENCES ACT, 1967

The Sexual Offences Act, 1967 decriminalized homosexual acts between consenting adults in private. The Act does not apply in Scotland or Northern Ireland.

The legislation was introduced as a Private Member's Bill during the Labor Government of Harold Wilson, on 5 July 1966. Voting was according to conscience.

The impetus for reform of the law had been the Wolfenden Report which had underlined the futility of criminal sanctions against homosexual acts in private. The report had generated much public controversy and it took 9 years from the time of its publication before the law was amended. It should be noted that the United Kingdom Legislation, being the first legislation enacted after the handing down of the Wolfenden Report is still cautious in its approach. The Sexual Offences Act (1967) styled as "an act to amend the law of England and Wales relating to homosexual acts" was assented to on the 27th day of July 1967. Section 1 of the Act Amendment of Law Relating to Homosexual Acts in Private states:-

(1) Notwithstanding any statutory or common law provision, but subject to the provisions of the next following section, a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years.

(2) An act which would otherwise be treated for the purposes of this Act as being done in private shall not be so treated if done:

  (a) when more than two persons take part or are present; or

  (b) in a lavatory to which the public have or are permitted to have access, whether on payment or otherwise.

Sub-section 3 provides that a man who is suffering from severe subnormality within the meaning of the Mental Health Act of 1959 cannot in law give any consent.

Sub-section 4 provides that section 128 of the Mental Health Act 1959 (Prohibition on men on the staff of a hospital, or otherwise having responsibility for mental patients, having sexual intercourse with women patients) shall have effect as if in any reference therein to having unlawful sexual intercourse with a women included a reference to committing buggery or an act of

gross indecency with another man. Sub-section 6 places the burden of proof upon the prosecution to show that the act was done otherwise than in private or otherwise then with the consent of the parties, or that any of the parties had not obtained the age of 21 years.

UNITED STATES

CALIFORNIA PENAL CODE

Criminal Law is a state matter, so, as in Australia, there is a lack of uniformity in the law as it applies to homosexual practices in the United States.

For the purposes of this exercise comments will be restricted to the state of California.

CALIFORNIAN PENAL CODE: PRIOR TO AMENDMENT

288 - Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than 5 years. (crime against nature)

187 - Any sexual penetration, however slight, is sufficient to complete the crime against nature. (penetration sufficient to complete the crime)

The following comments are taken from the Statutes of 1975 Summary Digest (a useful summary of comments made in the State Legislature published by the Californian Legislature to explain the purposes behind the introduction of new legislation), Chapter 71:-

> "Under present (Californian) law adulterous cohabitation, sodomy, and oral copulation are crimes. This Bill removes criminal sanctions from adulterous cohabitation; and it removes specific criminal sanctions from sodomy and oral copulation except:
>
> (1) When the sodomy or oral copulation is committed with a minor or by force, violence, duress, menace or threat of great bodily harm; and
>
> (2) Except where the participants are confined in state prison or specified detention facilities.
>
> This Bill makes sexual assault on an animal for specialized purposes a misdemeanour.
>
> Under present law sodomy with a human is prohibited as a felony in the state prison for not less than one year. This Bill increases the punishment to not less than three

years state imprisonment in the case of sodomy by force, violence, duress, menace or threat of great bodily harm, and in cases where the other person is 14 years of age and 10 years younger than the defendant. If the sodomy is with a person under 18, sodomy is punishable under the Bill as a felony - misdemeanour by imprisonment in state prison for not more than 15 years or in a county jail for not more than 1 year.

This Bill substantially retains the punishment for oral copulation under existing law. The law presently also provides that commission of various sexual offences is ground for denial or revocation of a teaching credential or certificate or for discharge or denial of employment to teachers and other school district employees.

"Sex offence" is defined for such purposes by reference to the penal code provision prohibiting specific sexual conduct. This Act provides that such reference will continue to apply to sodomy and oral copulation committed prior to the effective date of this Act. Present law accepts adultery proceedings from provisions granting a married person a privilege not to testify against his spouse and from those provisions establishing a privilege for confidential marital communication. This Act revises these exceptions to reflect the elimination of adulterous cohabitation as a crime.

Under present law, a person who is determined to be a mentally disordered sex offender must register as a sex offender. This Act continues to require the registration of persons determined to be sexual psychopaths or mentally disordered sex offenders under any provision contained in the welfare and institutions code provisions relating to admissions and commitments to mental hospitals upon or prior to the effective date of the amendments made by this Act."

The above represents a useful summary of amendments to Californian legislation. Of particular note is the fact that criminal sanctions are retained where the sodomy or oral copulations is committed either with a minor or by force, or by duress or threats and in the case of people who have been institutionalized in criminal detention centres. Of further note is the fact that the law also provides that a conviction for any of a variety of sex offences is a ground for denial or revocation of a teaching certificate. What was styled "adulterous cohabitation", which is presumed to be living in a defacto relationship has also been removed from the statutes.

Under the amending legislation section 286 of the Californian Penal Code was amended to read:

286 (a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person.

(b) Any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison for a period of not more than 15 years or in a county jail for a period of not more than 1 year.

(c) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of sodomy by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for a period of not less than 3 years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of sodomy by force or violence and against the will of the victim shall be punished by imprisonment in the state prison for a period of 5 years to life.

(e) Any person who participates in an act of sodomy with any person of any age or confined in any state prison, as defined in section 4504, or any local detention facility as defined in section 6031.4, shall be punished by imprisonment in the state prison for a period of not more that 5 years, or in a county jail for a period of not more than 1 year.

Section 287 of the Penal Code was amended to read:

287 Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

Section 288(a) of the Penal Code is amended to read:

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person.

(Such definition incorporates both acts of fellatio and cunnilingus.)

(b) Any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison for a period of not more than 15 years or in a county jail for a period of not more than 1 year.

It is of note that in California the period of imprisonment for an act of oral copulation with a minor is the same as for sodomy. Therefore, the crime of oral copulation has been elevated to the same level as that of sodomy. Use of the word "any" makes consensual oral copulation between two consenting persons under the age of 18 an offence with equal degree of criminality in California.

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of oral copulation by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for a period of not less than 3 years.

(d),(e) There are separate offences of aiding and abetting an act of oral copulation or oral copulation when confined in any state prison.

There is no mention of privacy in the California amendments. At the same time that the Bill removes criminal sanctions from adulterous cohabitation, and removes specific criminal sanctions from sodomy and oral copulation, the criminal sanction for acts of sodomy and oral copulation other than those specifically removed from the code has been increased.

Sufficient understanding of the California amendments can be gleaned from the "1975 Summary Digest" comments.

CANADA

CRANKSHAWS CRIMINAL CODE OF CANADA

Canadian Public and Government opinion were influenced by the wide publicity given to the Wolfenden Report and the subsequent English reform of the law. The Criminal Code of Canada was amended to decriminalize homosexual acts between consenting adults in private in 1969.

The amendment was included as merely one provision of the Criminal Law Amendment Bill, (1968), which was an omnibus Bill introduced by the Minister of Justice in the Trudeau Liberal Government, the Honourable John Turner, to effect a number of substantive and procedural changes to Canada's criminal law. Voting was along party lines with the National Democratic Party members supporting the Liberal Government, and the Progressive Conservative and Social Credit members voting against the legislation.

The Criminal Code (Canada) 1970 provides:

155 Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for 14 years. (Buggery or bestiality).

156 Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for 10 years and to be whipped. (Indecent assault on male) (since repealed) (1980-82).

157 Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for 5 years. (Acts of gross indecency).

158 (1) Sections 155 and 157 do not apply to any act committed in private between:

(a) a husband and his wife; or

(b) any two person each of whom is 21 years or more of age,

both of whom consent to the commission of the act.

(2) For the purpose of Sub-section (1):

(a) an act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present; and

(b) a person shall be deemed not to consent to the commission of an act:

(i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by force and fraudulent misreputations as to the nature and quality of the act; or

(ii) if that person is, and the other party to the commission of the act knows or has good reason to believe that the person is feeble minded, insane or an idiot or imbecile.

The Canadian approach is to provide for the offence and then to create exceptions. i.e. sections 155 and 157 do not apply to any act committed in private between a husband and wife or any two persons above the age of 21. Note the definitions of privacy and definitions of consent.

NEW ZEALAND

CRIMES ACT 1961

THE SUBSTANTIVE LAW TODAY

The existing law on homosexual acts in New Zealand was amended in 1986 by the Homosexual Law Reform Act (1986). The preamble to that act states:

> "An act to amend the Crimes Act 1961 by removing criminal sanctions against consensual homosexual conduct between males, and by consequentially amending the law relating to consensual anal intercourse."

The effect of this Act is to amend the principal Act by repealing section 140, and substituting the following sections:

"140 Indecency with boy under 12:

(1) Every one is liable to imprisonment for a term not exceeding 10 years who, being a male:

(a) indecently assaults any boy under the age of 12 years; or

(b) does any indecent act with or upon any boy under the age of 12 years; or

(c) induces or permits any boy under the age of 12 years to do any indecent act with or upon him.

(2) It is no defence to a charge under this section that the boy consented, or that the person charged believed that the boy was of or over the age of 12 years.

(3) The boy shall not be charged as a party to an offence committed upon or with him against this section."

"140A Indecency with boy between 12 and 16:

(1) Every one is liable to imprisonment for a term not exceeding 7 years who, being a male:

(a) indecently assaults any boy of or over the age of 12 years and under the age of 16 years; or

(b) does any indecent act with or upon any such boy; or

(c) induces or permits any such boy to do any indecent act with or upon him.

(2) It is a defence to a charge under this section if the person charged proves that the boy consented and that he is younger than the boy;

Provided that proof of the said facts shall not be a defence if it is proved that such consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(3) It is a defence to a charge under this section if the person charged proves that the boy consented, that he was under the age of 21 years at the time of the commission of the act, and that he had reasonable cause to believe, and did believe, that the boy was of or over the age of 16 years;

Provided that proof of the said facts shall not be a defence if it is proved that the consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(4) Except as provided in this section, it is no defence to a charge under this section that the boy consented, or that the person charged believed that the boy was of or over the age of 16 years.

(5) The boy shall not be charged as a party to an offence committed upon or with him against this section.

(6) No one shall be prosecuted for an offence against this section, except under paragraph (a) of sub-section (1) thereof, unless the prosecution is commenced within 12 months from the time the offence was committed."

The principal Act was further amended by the repealing of section 141 and substituting therefore the following.

"**Indecent assault on man or boy:**

141. Every one is liable to imprisonment for a term not exceeding 7 years who, being a male:

(a) indecently assaults any man or boy of or over the age of 16 years; or

(b) does anything to any man or boy of or over the age of 16 years, with his consent, which but for such consent would have been an indecent assault, such consent being obtained by a false and fraudulent representation as to the nature and quality of the act."

The effect of the Homosexual Law Reform Act, was to further amend the principal Act by repealing section 142, and substituting therefore the following.

"142. Anal Intercourse -

(1) Every one commits an offence who commits an act of anal intercourse on any person:

(a) who is under the age of 16 years; or

(b) who is severely subnormal, and the person committing the act knows or has good reason to believe that the person upon whom the act is committed is severely subnormal.

(2) For the purposes of sub-section (1)(b) of this section, a person is severely subnormal if that person is mentally subnormal, within the meaning of the **Mental Health Act**, 1969, to the extent that the person is incapable of living an independent life or of guarding himself or herself against serious exploitation or common physical dangers.

(3) Every one who commits an offence against this section is liable to imprisonment:

(a) in any case where the person upon whom the act was committed was, at the time of the commission of the act, under the age of 12 years, for a term not exceeding 14 years; or

(b) in any other case, for a term not exceeding 7 years.

(4) an offence against this section is complete upon penetration.

(5) The person upon whom the act of anal intercourse is committed shall not be charged with being a party to the offence.

(6) Subject to sub-section (9) of this section, it is a defence to a charge under sub-section (1)(a) of this section if the person charged proves that the person upon whom the act of anal intercourse was committed consented and that he is younger than that person;

Provided that proof of the said fact shall not be a defence if it is provided that such consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(7) Subject to sub-section (9) of this section, it is a defence to a charge under sub-section (1)(a) of this section if the person charged proves that the person upon whom the act of anal intercourse was committed consented, and the person charged was under the age of 21 years at the time of the commission of the act,

that he had reasonable cause to believe, and did believe, that the person upon whom the act was committed was of or over the age of 16 years;

Provided that proof of the said fact shall not be a defence if it is proved that the consent was obtained by a false and fraudulent representation as to the nature and quality of the act.

(8) Subject to sub-section (9) of this section, no-one shall be prosecuted for any offence against this section unless the prosecution is commenced within 12 months from the time when the offence was committed.

(9) The provisions of sub-section (6), (7) and (8) of this section shall not apply where the person upon whom the act of anal intercourse was committed was under the age of 12 years at the time of the commission of the act.

(10) Except as provided in this section, it is no defence to a charge under this section that the person upon whom the act of anal intercourse was committed consented, or that the person charged believed that the person was of or over the age of 16 years."

Section 6 of the Homosexual Law Reform Act of 1986, had the effect of repealing section 146 of the principal Act. Section 6 "keeping place of resort for homosexual acts" provides for an offence of:

"(1) Section 146 of the principal Act is hereby repealed.

(2) Section 147(2) of the principal Act is hereby amended by omitting the word "woman", and substituting the word "person"."

Section 8 of the Amending Act excludes the operation of the Amending Act and its effect on the principal Act from the armed forces.

The net effect of the New Zealand 1986 reforms of homosexual law is as follows:

Under the new statutory regime, boys under the age of 12 years are protected from indecent molestation by section 140. There is no defence of consent nor can any criminality be imputed to the child. The maximum penalty is 10 years. The insertion of section 140A in the 1986 Act "Indecency with boy between 12 and 16" means that sexual molestation of boys between the ages of 12 and 16 now attracts a lesser penalty of 7 years. A defence of consent applies in the case of the accused being younger than the victim. Under 140A(3) a defence of assent is available, if the accused is under 21 and made an honest and reasonable mistake of

fact as to the age of the boy. In no other cases is there a defence of consent.

The offence in section 141 "indecency between males" was replaced with one of "indecent assault on man or boy" The principle differences are that the maximum penalty has been increased from 5 to 7 years and that there is now a defence of consent, save where such consent has been obtained by a false and fraudulent representation as to the nature and quality of the act.

Under the new section 142 "anal intercourse" a person who commits an act of anal intercourse with a boy under 16 or a mental defective is guilty of an offence.

CHAPTER 5

OPTIONS FOR QUEENSLAND

There is an abundance of legislative models from which to draw direction, and the exercise is really more one of being sufficiently eclectic to draw from the best aspects of each and to learn from past legislative mistakes.

Generally, homosexual law reform in other English speaking jurisdictions has followed the form of decriminalizing homosexual acts between consenting adults in private. There will always need to be provision to protect children from sexual molestation, it is not the purpose of homosexual law reform to remove this protection. Homosexual law reform is not just a simple matter of removing those sections from the Criminal Code that proscribe homosexual activity - provision still needs to be made in the Code to protect the victims of non-consensual homosexual acts. To this end, certain provisions of the code need to be gender neutralized (rape etc.) so that they can apply equally to males and females.

One thing must be made clear. Just because a majority of Australian states and overseas jurisdictions have decriminalized homosexual behaviour, this should not be used as a reason for the same thing happening in Queensland. Populations around the world have been known to differ in their attitudes to, and perception of, social and moral issues of the day. Thus, it should not surprise anyone if the people of Queensland express their opinion totally in contrast to those of other jurisdictions. Again, on social and moral issues, parliaments around the world have been known to have passed laws which were contrary to the views expressed by the majority of public opinion. Capital punishment could never have been abolished in many countries if the legislatures would have adhered to the majority public opinion. In these instances 'public opinion' was used in a narrow sense, the opinion of those, in the words of Dicey, "the majority of those citizens who have at a given moment taken an effective part in public life."[1]

In Table 5 legislations dealt with in Chapter 4 have been summarized. It appears essential that while considering law reform in Queensland, among others, the following issues should be examined.

1 A.V. Dicey, Law and Public Opinion in England During the Nineteenth Century, London, Macmillan & Co. Ltd, 1962, p. 10.

STATE JURISDICTIONS

STATE JURISDICTION	YEAR	LEGISLATION	AGE OF CONSENT	EFFECT OF DECRIMINALIZATION
South Australia	1975	Criminal Law (Sexual Offences) Act Amendment Act 1975	17	. Abolition of the crime of sodomy. . Sex offences gender neutral. . Privacy not in issue with homosexual offences.
A.C.T.	1976	Law Reform (Sexual Behaviour) Ordinance 1976	18	. Defences provided of "consenting adults in private".
Victoria	1980	Crimes (Sexual Offences) Act 1980	18	. Decriminalize homosexual acts. . Sexual offences gender neutral. . Privacy not in issue with homosexual offences.
Northern Territory	1983	The Criminal Code 1983	18	. Decriminalize homosexual acts between consenting adults in private. . Carnal knowledge, gross indecency with a male in public still an offence, wide definition of in public.

STATE JURISDICTION	YEAR	LEGISLATION	AGE OF CONSENT	EFFECT OF DECRIMINALIZATION
N.S.W.	1984	The Crimes Act (Amendment Act) 1984	18	. Decriminalizes homosexual acts between consenting adults in private.
W.A.	1989	Law Reform (Decriminal-ization of Sodomy) Act	Male 21 Female 18	. Decriminalizes homosexual acts between consenting adults in private.
Tasmania	-	-	-	. No reform attempted. Current move toward decriminalization.
Queensland	-	-	-	. No reform attempted.

OVERSEAS JURISDICTIONS

OVERSEAS JURISDICTION	YEAR	LEGISLATION	AGE OF CONSENT	EFFECT OF DECRIMINALIZATION
England	1967	The Sexual Offences Act	21	. Decriminalize homosexual acts between consenting adults in private
Canada	1969	The Criminal Code (Canada)	21	. Defence to offences of buggery and acts of gross indecency if committed by husband and wife or 2 consenting adults in private.
California	1975	California Penal Code	18	. Decriminalizes homosexual acts by consenting adults.
New Zealand	1986	Homosexual Law Reform Act (1986)	16	. Removes criminal sanctions against consensual homosexual conduct between males and decriminalize anal sex generally. . No mention of privacy.

(1) The age of consent to homosexual acts. It would accord with principles of sexual equality and anti-discrimination that the age of consent for males and females be the same irrespective of whether the sexual act is heterosexual or homosexual. Western Australia is the only observed jurisdiction where the age of consent for homosexual acts is not the same as for heterosexual acts.

(2) Whether a distinction should be drawn between public and private homosexual conduct. South Australia and Victoria make no mention of privacy in their legislation controlling homosexual conduct. In those two states, a homosexual act is only an offence in circumstances that a heterosexual act would also constitute an offence (e.g. in a public place). In the other Australian jurisdictions, homosexual acts are not offences if committed in private. The Northern Territory definition of "in private" is:

> "with only one other person present and not within the view of a person not a party to the act".

The definition is too wide to be effective. A better definition of privacy would be similar in form to that found in the Canadian Criminal Code. The Canadian definition of "in private" is as follows:

> "An act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present."

(3) Whether a separate offence of soliciting should be retained. It is advisable that the gender neutrality approach be adopted and that homosexual soliciting only be an offence in situations where heterosexual soliciting is also an offence.

(4) Whether a limited defence should be available for a homosexual mistaking his partner's age as being above the age of consent. An approach should be adopted that all defences available to a charge of carnal knowledge of a girl under the age of consent should be equally available to a similar charge against a male for underaged homosexual conduct.

Furthermore, in any attempt to reform laws on homosexual behaviour the following needs to be borne in mind:

(a) the need to protect children (irrespective of gender);

(b) the need to guard public decency;

(c) the desirability of removing inconsistencies between penalties based on the gender of either the perpetrator or the victim in offences.

Accordingly, amendments to the following Acts and sections would be required:

Criminal Code of Queensland - Sections 208-211, 215, 336, 337, and 347.

The Liquor Act - Section 78

The Health Act - Section 48

(For ready reference see Appendix A)

APPENDIX A

QUEENSLAND LAW

Section 208 - Unnatural Offences

Any person who:

(1) Has carnal knowledge of any person against the order of nature; or

(2) Has carnal knowledge of an animal; or

(3) Permits a male person to have carnal knowledge of him or her against the order of nature;

is guilty of a crime, and is liable to imprisonment with hard labour for seven years.

In the case of an offence defined in paragraph (1) or (3) committed in respect of a child under the age of sixteen years, the offender is liable to imprisonment:

(a) for fourteen years or, if the child is under the age of twelve years, for life; or

(b) for life if the child is, to the knowledge of the offender, his lineal descendant or if the offender is a guardian of the child or, for the time being, has the child under his care.

Section 209 - Attempt to commit Unnatural Offences

Any person who attempts to commit any of the crimes defined in the last preceding section is guilty of a crime, and is liable to imprisonment with hard labour for three years.

In the case of an attempt to commit a crime defined in paragraph (1) or (3) of section 208, if the offence is committed in respect of a child under the age of sixteen years, the offender is liable to imprisonment:

(a) for seven years or, if the child is under the age of twelve years, for fourteen years; or

(b) for fourteen years if the child is, to the knowledge of the offender, his lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care.

The offender cannot be arrested without warrant except in a case referred to in the preceding paragraph.

Section 210 - Indecent treatment of children under sixteen

Any person who:

(1) unlawfully and indecently deals with a child under the age of sixteen years;

(2) unlawfully procures a child under the age of sixteen years to commit an indecent act;

(3) unlawfully permits himself to be indecently dealt with by a child under the age of sixteen years;

(4) wilfully and unlawfully exposes a child under the age of sixteen years to an indecent act by the offender or any other person;

(5) without legitimate reason, wilfully exposes a child under the age of sixteen years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter;

(6) without legitimate reason, takes any indecent photograph or records, by means of any device, any indecent visual image of a child under the age of sixteen years,

is guilty of an indictable offence.

If the child is of or above the age of twelve years, the offender is guilty of a misdemeanour, and is liable to imprisonment for five years.

If the child is under the age of twelve years, the offender is guilty of a crime, and is liable to imprisonment for ten years.

If the child is, to the knowledge of the offender, his lineal descendant or if the offender is the guardian of the child or, for the time being, has the child under his care, he is guilty of a crime, and is liable to imprisonment for ten years.

If the offence is alleged to have been committed in respect of a child of or above the age of twelve years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of sixteen years.

A person may be convicted of an offence defined in this section upon the uncorroborated testimony of one witness, but the Court shall warn the jury of the danger of acting on such testimony unless they find that it is corroborated in some material particular by other evidence implicating that person.

The term "deals with" includes doing any act which, if done without consent, would constitute an assault as defined in this Code.

Section 211 - Indecent Practices between Males

Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.

The offender may be arrested without warrant.

Section 215 - Carnal knowledge of girls under sixteen

Any person who has or attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of an indictable offence.

If the girl is of or above the age of twelve years, the offender is guilty of a misdemeanour, and is liable to imprisonment for five years.

If the girl is under the age of twelve years, the offender is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for ten years.

If the girl is not the lineal descendant of the offender but the offender is her guardian or, for the time being, has her under his care, he is guilty of a crime, and is liable to imprisonment for life or, in the case of an attempt to have unlawful carnal knowledge, to imprisonment for fourteen years.

If the offence is alleged to have been committed in respect of a girl of or above the age of twelve years, it is a defence to prove that the accused person believed, on reasonable grounds, that the girl was of or above the age of sixteen years.

A prosecution for an offence defined in this section, if not begun within two years after the offence is committed, shall not be begun without the consent of a Crown Law Officer.

A person may be convicted of an offence defined in this section upon the uncorroborated testimony of one witness, but the Court shall warn the jury of the danger of acting on such testimony unless they find that it is corroborated in some material particular by other evidence implicating that person.

Section 336 - Assault with Intent to Commit Unnatural Offence

Any person who assaults another with intent to have carnal knowledge of him or her against the order of nature is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.

Section 347 - Definition of Rape

Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.

In the preceding paragraph "married woman" includes a woman living with a man as his wife though not lawfully married to him and "husband" has a corresponding meaning.

Liqour Act 1912-1985

Section 78 - Prohibition of gaming and disorderly persons, etc.

Any licensed victualler who suffers or permits -

(a) Any person to play any game or sport declared under any law to be an unlawful game or sport in or upon his licensed premises or the appurtenanced thereto; or

(b) Prostitutes, thieves, drug dealers, sexual perverts or deviants, child molesters or persons of notoriously bad character, or drunken or disorderly persons, to be in or upon such premises or appurtenances;

shall for the first offence be liable to a penalty not exceeding two hundred dollars, for the second offence to a penalty not exceding four hundred dollars, and for the third offence to a penalty not exceding one thousand dollars and forfeiture of his license; and he shall be disqualified for ever from holding any license under this Act.

The playing of such game or sport, or the presence of reputed prostitutes longer than is necessary for the purpose of obtaining temporary refreshment, or the continuous staying of reputed

thieves, drug dealers, sexual perverts or deviants, child molesters or persons of notoriously bad character or drunken or disorderly persons upon any such licensed premises or the appurtenances thereto shall, respectively, be prima facie evidence that the licensee permitted such playing or permitted such persons as aforesaid to be in and upon his premises or appurtenances.

Every conviction of a licensee for any offence under this section shall be recorded in the register of licenses, and shall be endorsed on his licence.

Health Act 1937-1988

Section 48 - Controlled notifiable diseases.

(1) The Governor in Council may by notification published in the Gazette declare any notifiable disease to be or to no longer be a controlled notifiable disease for the purpose of this section.

(2) Any person who knowingly infects another person with a controlled notifiable disease commits an offence against this Act unless, at the time the disease was transmitted to that other person, that other person-

(a) was the spouse of or was de facto the spouse of the firstmentioned person;

(b) knew that the firstmentioned person was infected with the controlled notifiable disease; and

(c) voluntarily accepted the risk of being infected.

Penalty: 200 penalty units or 2 years imprisonment or both.

(3) All proceedings under this Division in any court relating to a controlled notifiable disease shall be heard in camera.

(4) No report shall be made or published concerning any proceedings of the kind referred to in subsection (3) unless the report-

(a) is authorized by the court concerned;

(b) is made for the purpose of those proceedings or of proceedings related to those proceedings;

(c) is contained in or is made for the purpose of being contained in a recognised series of Law Reports; or

(d) is made for or on behalf of the Director-General.

Penalty for first offence:
20 penalty units or imprisonment for six months

Penalty for subsequent offence:
80 penalty units or imprisonment of twelve months

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