

**Submission to the NSW Legislative Council’s  
Standing Committee on Social Issues’  
Inquiry Into An Equal Age of Consent**

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## 1. Executive Summary

This is a joint submission of the New South Wales Council for Civil Liberties and the University of New South Wales Council for Civil Liberties (referred to in this document as the Councils for Civil Liberties).

Equalising the age of consent for heterosexual and homosexual males is required to eliminate discrimination against homosexual males in NSW law. The existence of criminal laws aimed specifically at homosexual males is highly discriminatory and such laws should be repealed.

Traditionally, the common law and older statutory offences relating to sexual offences took a proprietary approach to both women and children. The real object of such laws should be prevention of non-consensual behaviour and the protection of children. In this regard, there is no basis for a distinction based on sexuality.

The existence of specific homosexual offences also raises several anomalies in the area of penalties for homosexual offences. Also the broader statutory definitions of sexual acts introduced into the *Crimes Act 1900 (NSW)* now mean that the same act could be criminal simply when performed with a male rather than a female. Passage of the *Crimes Amendment (Sexual Offences) Bill 2002* through the Parliament would eliminate these anomalies and inconsistencies.

The current laws pertaining to homosexual offences in NSW are inconsistent with the United Nations *Covenant on Civil and Political Rights*. In breach of Article 17, the State is interfering with the privacy of homosexual males engaging in consensual sexual activity in a way that does not apply to heterosexuals engaging in the same conduct. In breach of Article 26, the current discriminatory laws violate the fundamental human right to equality before the law.

The social impact of the current discriminatory regime applying to homosexual conduct in NSW should not be understated.

Recent research has found that same-sex attracted male youths are three to four times more likely to attempt suicide than their heterosexual peers. This alarming figure demands that the emphasis in this debate should be on the psychological and physical well-being of the young men themselves, not on arguing questions of morality.

By criminalizing the sexual conduct of young same-sex attracted males the State sends a very strong harmful message to the community, and to the young men themselves, that their homosexuality is something of which to be ashamed.

It is not the role of the criminal law, nor should it be the intention of Parliament, to support and reinforce homophobia and intolerance within our community.

The *Crimes Amendment (Sexual Offences) Bill 2002* should be recommended to the Parliament to eliminate discrimination against male homosexuals, to bring NSW law into line with the State's obligations under international human rights treaties and to remove a stigmatising element from NSW law.

The Councils for Civil Liberties strongly encourage the Standing Committee to recommend the *Crimes Amendment (Sexual Offences) Bill 2002* to the Parliament and also recommends a non-discriminatory similarity of age defence be included.

## 2. Introduction

The *Crimes Amendment (Sexual Offences) Bill 2002* proposes two significant changes to the *Crimes Act 1900 (NSW)*. The first is the repeal of the offences specific to homosexual males. The second is the equalisation of the age of consent.

The retention of specific male homosexual criminal provisions and the differentiated age of consent is out of step with the broad trend of eliminating discrimination against homosexuals in NSW law. It is also out of step with the spirit and purpose of anti-discrimination law in NSW.

There is no logical reason why the specific homosexual offences should be retained. The framers of the Model Criminal Code saw no need to institute specific homosexual offences.<sup>1</sup>

Currently in NSW the age of consent for homosexual males is 18, while the age of consent for heterosexuals and lesbians is 16.

Same-sex attracted male youths who participate in sexual activity at the ages of 16 or 17 are *criminals* in NSW, whereas their heterosexual and lesbian peers are not. This constitutes an extreme form of institutionalised discrimination in the criminal law.

The criminalisation of same-sex attracted youth is a highly undesirable outcome both legally and socially, especially in the light of recent research into the risk factors of youth suicide.

By repealing the offences specific to homosexual males and by equalising the age of consent, the Bill continues the project to remove all discrimination from the laws of New South Wales. Such reform is in keeping with international human rights standards and is long overdue.

**For these reasons, the Councils for Civil Liberties encourage the Standing Committee to recommend the *Crimes Amendment (Sexual Offences) Bill 2002* to the Parliament.**

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<sup>1</sup> Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code: Chapter 5 "Sexual Offences Against the Person" Report*, May 1999, p19

### 3. Legal Impact

#### 3.1 Discriminatory Age of Consent

In NSW the age of consent for heterosexuals and lesbians is 16 years.<sup>2</sup>

In NSW the age of male homosexual consent is 18 years.<sup>3</sup> This is the highest age of consent of any Australian State. The Northern Territory is the only other jurisdiction to share this age of male homosexual consent.<sup>4</sup>

In Victoria<sup>5</sup>, Queensland<sup>6</sup>, Western Australia<sup>7</sup> and the ACT<sup>8</sup> the (non-discriminatory) age of consent is 16 years. It is 17 years in South Australia<sup>9</sup> and Tasmania.<sup>10</sup>

New South Wales is the only State in Australia to maintain a discriminatory age of male homosexual consent.<sup>11</sup> The Northern Territory is the only other jurisdiction to make this discriminatory distinction.<sup>12</sup>

In order to avoid unnecessary controversy, the Model Criminal Code Officers' Committee decided not to nominate a recommended age of consent.<sup>13</sup> The Committee felt that it was necessary to consult more widely before settling definitively on an age.

However, the Committee did recommend that "the age of consent for both females and males, and for straight, male homosexual and lesbian sexual contact, be uniform *within* each jurisdiction".<sup>14</sup>

Furthermore, the Model Criminal Code Committee recommended that the age of consent be standardised across jurisdictions.<sup>15</sup> It should be noted that three States and the ACT have already adopted an age of consent of 16 years.

**The Councils for Civil Liberties endorse the proposal to adopt a non-discriminatory and equal age of consent of 16 years in New South Wales.**<sup>16</sup>

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<sup>2</sup> *Crimes Act 1900* (NSW) s 66C

<sup>3</sup> *Crimes Act 1900* (NSW) s 78K

<sup>4</sup> *Criminal Code 1983* (NT) s 128

<sup>5</sup> *Crimes Act 1958* (Vic) s 45;

<sup>6</sup> *Criminal Code 1899* (Qld) s 210. Note: the age of consent for anal intercourse is 18 years (s 208). Section 208 is non-discriminatory in that it applies to the consent of both males & females, heterosexuals & homosexuals.

<sup>7</sup> *Criminal Code 1913* (WA) s 321. Note: prior to the proclamation of the *Acts Amendment (Lesbian and Gay Law Reform) Act 2001* (WA) on 21 September 2002, the age of male homosexual consent in WA was 21 years.

<sup>8</sup> *Crimes Act 1900* (ACT) s 55

<sup>9</sup> *Criminal Law Consolidation Act 1935* (SA) s 49

<sup>10</sup> *Criminal Code 1924* (Tas) s 124

<sup>11</sup> *Crimes Act 1900* (NSW) s 78K

<sup>12</sup> *Criminal Code 1983* (NT) s 128

<sup>13</sup> *Model Criminal Code Report*, Note 1 above, Section 5.2.10 (definition of 'child'), p.123

<sup>14</sup> *Model Criminal Code Report*, Note 1 above, p.123

<sup>15</sup> *Model Criminal Code Report*, Note 1 above, p.123

<sup>16</sup> *Crimes Amendment (Sexual Offences) Bill 2002* (NSW) Schedule 1 [7]

### 3.2 Discriminatory Offences

The male homosexual offences in the *Crimes Act* unnecessarily duplicate the existing gender- and sexuality-neutral offences.<sup>17</sup> The only substantive differences are the age of consent and the penalties.<sup>18</sup>

There is only one male homosexual offence that is not precisely duplicated by the gender-neutral offences: an act of gross indecency.<sup>19</sup> It is similar to the gender-neutral crime of an act of indecency.<sup>20</sup> In a sense the generic offence is superior because it is supplemented by an offence that takes circumstances of aggravation into account.<sup>21</sup> The Wood Royal Commission questioned the rationale and wisdom of retaining a discriminatory offence of ‘gross indecency’ specifically for male homosexuals.<sup>22</sup>

The *Crimes Act* currently contains a gender- and sexuality-neutral definition of sexual intercourse<sup>23</sup> that covers all the activities in the definition of homosexual intercourse.<sup>24</sup> Again it could be said that the generic definition is superior because it is much broader in its scope.<sup>25</sup>

The Model Criminal Code does not include any offences specific to male homosexuals.<sup>26</sup> The drafting committee explained that:

...[t]he Model Criminal Code adopts a gender-neutral approach so that equal protection extends to male and female victims, and equal punishment to male and female perpetrators. The sexual offences in the Code are directed towards protecting children and adults from sexual assault. Questions of gender and sexuality have nothing to do with that goal, and there is no good reason why the criminal law should discriminate against a particular sexual preference.<sup>27</sup>

### The Councils for Civil Liberties endorse the repeal of the discriminatory offences specific to male homosexuals in New South Wales.<sup>28</sup>

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<sup>17</sup> ss 66A=78H (child under 10); ss 66B=78I (attempt, child under 10); ss 66C=78K (child between 10 and age of consent); ss 66D=78L (attempt child between 10 and age of consent); ss 73=78N (carnal knowledge by teacher, father, stepfather); ss 74=78O (attempt, carnal knowledge by teacher, father, stepfather).

<sup>18</sup> for penalties, see “Discriminatory Penalties” below. The minimum age for carnal knowledge offences differ markedly (ss 73 & 74: 16 years; ss 78N & 78O: 10 years).

<sup>19</sup> s 78Q (acts of gross indecency)

<sup>20</sup> s 61N (acts of indecency).

<sup>21</sup> s 61O (aggravated acts of indecency)

<sup>22</sup> Wood Royal Commission into the New South Wales Police Service, *Final Report – Volume V: The Paedophile Inquiry*, August 1997, at 14.62 & 14.65

<sup>23</sup> s 61H (definition of *sexual intercourse*)

<sup>24</sup> s 78G (definition of *homosexual intercourse*)

<sup>25</sup> for example *R v Gibbs* (NSW Court of Criminal Appeal, 18 June 1992, unreported) in which it was held that digital penetration of the anus is not covered by s 78G. Such an act qualifies as sexual intercourse under s 61H(1)(a). See also Howie R.N. & Johnson P.A., *Annotated Criminal Legislation New South Wales*, 2001/2002 edition, Butterworths, Sydney, at [8-s 78K.1]

<sup>26</sup> *Model Criminal Code Report*, Note 1 above, p.19

<sup>27</sup> *Model Criminal Code Report*, Note 1 above, p.19

<sup>28</sup> *Crimes Amendment (Sexual Offences) Bill 2002* (NSW) Schedule 1 [7]

### 3.3 Discriminatory Defences

#### 3.3.1 defence of consent

There is currently a limited statutory defence of consent to certain offences<sup>29</sup> under certain circumstances.<sup>30</sup> This defence is currently not available to male homosexuals.<sup>31</sup>

In fact, consent is no defence to any of the male homosexual offences.<sup>32</sup>

This defence should not be confused with the common law defence of honest and reasonable mistake of fact as to the age of the child.<sup>33</sup>

The Model Criminal Code Committee recommends that consent not be a defence to any of the offences of sexual acts committed against or with children.<sup>34</sup>

Given that such a defence is available to heterosexuals and lesbians in NSW, there is no logical reason why the discriminatory denial of such a defence to male homosexuals should be retained.

**The Councils for Civil Liberties endorse the non-discriminatory availability of the limited statutory defence of consent in New South Wales.**<sup>35</sup>

#### 3.3.2 defence of similarity of age

There is currently no defence of similarity of age in NSW for either heterosexuals or homosexual adolescents. This defence is sometimes referred to as a “Romeo and Juliet” in heterosexual offences but is not available in NSW. If the real purpose of these offences is to protect children rather than criminalizing them, then such a defence should be available.

This defence recognises that it is undesirable to criminalise consensual activity between young adolescents of a similar age. For example, consensual sexual activity between a 16 year old and a 15 year old is a crime in NSW.

The Model Criminal Code provides a defence of similarity of age, available where the age differential is no more (or less) than two years<sup>36</sup> and both parties are over the ‘no defence age’.<sup>37</sup>

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<sup>29</sup> ss 61L (indecent assault); 61M(1) (aggravated indecent assault); 61N(1) (act of indecency with a child under 16); 61O(1) (aggravated act of indecency with a child under 16); 66C (sexual intercourse with a child between 10 and 16); and 66D (attempted sexual intercourse with a child between 10 and 16).

<sup>30</sup> s 77(2): the child is 14 years or older; **and**, consented to the intercourse; **and**, the accused had reasonable cause to believe that the child was 16 years or older. Note: all three circumstances must be met before this defence can be used. This means, for example, that this consent defence is not available to an accused who *knew* that the child was under 16.

<sup>31</sup> s 77(2): “if the person charged and the child to whom the charge relates are not both male”

<sup>32</sup> s 78R

<sup>33</sup> this defence is currently available for charges under s 78Q: see *Chard v Wallis* (1988) 12 NSWLR 453.

<sup>34</sup> *Model Criminal Code Report*, Note 1 above, s 5.2.15, pp. 142-3

<sup>35</sup> *Crimes Amendment (Sexual Offences) Bill 2002* (NSW) Schedule 1 [5]

<sup>36</sup> *Model Criminal Code Report*, Note 1 above, s 5.2.17

<sup>37</sup> ‘no defence age’: age below which a child is considered incapable of providing consent. This is the age of the child below which offences attract absolute liability. See *Model Criminal Code Report*, Note 1 above, pp. 125-7, 155. The drafting Committee chose not to nominate a recommended ‘no defence’ age (p. 127). The ‘no defence’ age in NSW is 10 years (ss 66A & 78H).

Some Australian jurisdictions have enacted this defence. In Victoria and the ACT the age difference is set at two years<sup>38</sup>; in Western Australia it is three<sup>39</sup>; and Tasmania uses a sliding scale.<sup>40</sup>

The Wood Royal Commission recommended the provision of such a defence in NSW with an age differential of two years.<sup>41</sup>

It should also be brought to the Standing Committee's attention that in the recent changes to the age of consent in Western Australia<sup>42</sup>, the age differential in the similarity of age defence was reduced from five to three years in order to address community concerns that "equalising the age of consent to 16 years might expose boys to unacceptable attention from older men"<sup>43</sup>.

While the Councils for Civil Liberties do not share the belief that such 'unacceptable attention' is peculiar to homosexual activity, the Councils point out to the Standing Committee that the inclusion of a similarity of age defence might go some way to allaying community concern on this issue. The Councils support a similarity of age defence that is non-discriminatory.

**The Councils for Civil Liberties strongly endorse a similarity of age defence and encourages the Standing Committee on Social Issues to recommend that an amendment to the bill to include this defence for both heterosexual and homosexual offences.**

### **3.4 Discriminatory Penalties**

The duplication of sexual offences with and against children in the *Crimes Act* has already been discussed.<sup>44</sup> The gender-neutral and male homosexual provisions have widely differing maximum penalties attached to them. These differences are inexplicable.

For example, the disparity in penalties for the substantive offences against children under the age of ten<sup>45</sup> seem to suggest that sexual intercourse with male children is *more* reprehensible than with female children of the same age. At the same time the attempt offences<sup>46</sup> seem to suggest an attempt to have sexual intercourse with a male child is *less* reprehensible than such an attempt against a female child.

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<sup>38</sup> *Crimes Act 1958* (Vic) s 45(4) ('no defence' age of 10 years); *Crimes Act 1900* (ACT) s 55(3) ('no defence' age of 10 years).

<sup>39</sup> *Criminal Code 1913* (WA) s 321(9) ('no defence' age of 13 years.: s 320). Note: this defence is not available to carers, supervisors or those with authority over the child: s 321(9a).

<sup>40</sup> *Criminal Code 1924* (Tas) s 124(3): if child over 15 years and accused no more 5 years older; if child over 12 years and accused no more than 3 years older. Note: this defence does not apply to anal intercourse in Tasmania: s 124(5).

<sup>41</sup> Note 22 at 14.39

<sup>42</sup> *Acts Amendment (Lesbian and Gay Law Reform) Bill 2001* (WA) assented to on 17 April 2002 and proclaimed on 21 September 2002

<sup>43</sup> WA Government, *Government Achievements Report*, 19 November 2001 to 17 December 2001, p. 2. Available at [http://www.ministers.wa.gov.au/Accountability/achievements\\_report\\_171201.pdf](http://www.ministers.wa.gov.au/Accountability/achievements_report_171201.pdf), accessed 8 October 2002.

<sup>44</sup> see "Discriminatory Offences" above.

<sup>45</sup> ss 66A (max. 20 yrs) and 78H (max. 25 yrs)

<sup>46</sup> ss 66B (max. 20 yrs) and 78I (max. 14 yrs)



The same confusion arises with the offences for carnal knowledge by teacher, father or step-father.<sup>47</sup> The penalties seem to suggest that it is worse to have sexual intercourse with a male child than a female child, while at the same time suggesting that it is worse to *attempt* to have sexual intercourse with a female child than a male child.

These anomalies, and others, were dealt with thoroughly in the Wood Royal Commission Report.<sup>48</sup>

The non-discriminatory changes proposed by the *Crimes Amendment (Sexual Offences) Bill 2002* (NSW) will remove these anomalies and inconsistencies in the law.

**The Councils for Civil Liberties endorse the implementation of consistent and non-discriminatory penalties for sexual acts with or against children in New South Wales.**<sup>49</sup>

### **3.5 Conclusion**

The changes to the NSW criminal law proposed in the Bill before the Standing Committee pose no legal problems whatsoever. They simply implement innovations which have been enacted in other Australian jurisdictions for some considerable time without any adverse affects.

In fact the Bill, by equalising the age of consent and by adopting an approach of gender-neutrality, is a positive step in terms of eliminating discrimination against, and the criminalisation of, same-sex attracted youth in New South Wales.

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<sup>47</sup> ss 73 (max. 8 yrs) & 74 (max. 8 yrs) and 78N (max. 14 yrs) & 78O (max. 7 yrs)

<sup>48</sup> Note 22 at 14.7

<sup>49</sup> *Crimes Amendment (Sexual Offences) Bill 2002* (NSW) Schedule 1 [7]

## 4. Human Rights Issues

### 4.1 *Toonen v Australia*

Discrimination against people on the grounds of their sexual orientation has for sometime been recognised internationally as a human rights issue.

In 1992, as was his right under the *First Optional Protocol to the International Covenant on Civil and Political Rights*<sup>50</sup>, Nicholas Toonen communicated to the UN Human Rights Committee (UNHRC) the breach of his rights to privacy<sup>51</sup> and equality before the law<sup>52</sup> as a consequence of the continued criminalisation of homosexuality in Tasmania.<sup>53</sup>

Article 17 of the *International Covenant on Civil and Political Rights* states that:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.<sup>54</sup>

Article 26 of the *International Covenant on Civil and Political Rights* states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>55</sup>

### 4.2 ***A discriminatory age of consent breaches the right to privacy***

The UNHRC determined that Mr Toonen’s right to privacy had been breached.<sup>56</sup>

Among other reasons, the Committee concluded that moral objections to the repeal of the Tasmanian laws were weakened by the fact that similar laws had been repealed in other Australian jurisdictions.<sup>57</sup> The fact that there was no moral consensus within the State on the issue of repeal further weakened any moral objections.<sup>58</sup>

The discriminatory age of consent in NSW constitutes an arbitrary interference in the privacy of 16- and 17-year old same-sex attracted males. The private matters of their

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<sup>50</sup> *First Optional Protocol to the International Covenant on Civil and Political Rights* (adopted by UN GA Resolution 2200A (XXI) of 16 December 1966; entered into force 23 March 1976)

<sup>51</sup> *International Covenant on Civil and Political Rights* (adopted by UN GA Resolution 2200A (XXI) of 16 December 1966; entered into force 23 March 1976), Article 17

<sup>52</sup> *International Covenant on Civil and Political Rights*, Article 26

<sup>53</sup> UN Human Rights Committee, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992, 4 April 1994. For an informative summary of the case & the Committee’s determination: *Toonen v Australia* [1994] PLPR 33.

<sup>54</sup> *International Covenant on Civil and Political Rights*, Article 17(1)

<sup>55</sup> *International Covenant on Civil and Political Rights*, Article 26

<sup>56</sup> Note 53 at [8.6]. Strictly-speaking there is no “right to privacy”; rather there is a “right to freedom from arbitrary or unlawful interference with privacy, family, etc” (Note 53 at [6.2]).

<sup>57</sup> Note 53 at [8.6]

<sup>58</sup> Note 53 at [8.6]

heterosexual and lesbian peers are not subject to the same arbitrary interference or criminal sanction.

Furthermore, one by one all Australian states, except New South Wales, have equalised the age of consent. The most recent to do so, in 2002, was Western Australia.<sup>59</sup> Also, there is no moral consensus in NSW concerning the repeal of the discriminatory age of consent.

These facts should be sufficient to ground any case for breach of the right to privacy based on the existing law.

### **4.3 Male homosexual offences breach the right to equality before the law**

It was the unanimous view of the UNHRC that the term “sex” in the list of grounds of discrimination (“race, colour and sex”<sup>60</sup>) in the *International Covenant on Civil and Political Rights* covered sexual orientation.<sup>61</sup>

In a dissenting opinion Committee Member Mr Bertil Wennergren took this finding to its logical conclusion. He expressed the view that laws that discriminate on the grounds of sexual orientation are in breach of the right to equality before the law.<sup>62</sup>

The homosexual provisions in the NSW *Crimes Act* discriminate on the grounds of sex in two significant ways. In the sense determined by the UNHRC, they discriminate between male homosexuals and male heterosexuals. In terms of gender, they discriminate between male & female homosexuals.<sup>63</sup>

This should be sufficient to ground any case for breach of the right to equality before the law.

### **4.4 Conclusion**

**Deeply concerned by these apparent breaches of international human rights standards in the criminal law of New South Wales, the Councils for Civil Liberties endorse all of the legislative changes proposed by the *Crimes Amendment (Sexual Offences) Bill 2002*.**

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<sup>59</sup> *Acts Amendment (Lesbian and Gay Law Reform) Bill 2001* (WA) was assented to on 17 April 2002 and came into operation upon Proclamation on 21 September 2002; amending *Criminal Code 1913* (WA) ss 321 & 321A and establishing an equal age of consent of 16 years of age.

<sup>60</sup> in both Articles 2(1) and 26 of the ICCPR

<sup>61</sup> Note 53 at [8.7] per majority; Note 53 per Mr Bertil Wennergren

<sup>62</sup> Note 53: *Appendix – individual opinion submitted by Mr Bertil Wennergren*. The majority, having found breach of Article 17, did not find it necessary to consider a breach of Article 26: Note 53 at [11].

<sup>63</sup> only male homosexuals are covered by ss78H-78T; lesbians are covered by the general provisions.

## 5. Social Impact

### 5.1 Introduction

The discriminatory age of consent and accompanying criminal provisions turn same-sex attracted male youths between the ages of 16 and 17 into criminals in New South Wales. This is highly significant in the social context of extraordinarily high youth suicide among same-sex attracted youths.

The Standing Committee should not focus on the competing moral standards surrounding this debate, but rather on the welfare of the young men who are most directly affected by the law's discriminatory and arbitrary criminalisation of them.

### 5.2 Youth Suicide

Arguments for retaining a discriminatory age of consent are often couched in the rhetoric of preventing moral harm to young men. The makers of such arguments never support their assertions with scientific data, nor do they acknowledge the great psychological harm their arguments cause same-sex attracted youth.

From the outset it is important to acknowledge that same-sex attracted youth exist. They are not "recruited" into their sexuality. In fact "recent Australian studies have consistently found that around 10% of young people aged 14 to 18 are sexually attracted to the same sex".<sup>64</sup>

Internalised and external homophobia place extra pressures on same-sex attracted teenagers, above and beyond the already considerable pressures placed on adolescents in contemporary New South Wales. The perpetuation of homophobic myths and stereotypes can have a devastating affect on same-sex attracted youth.

"Young people who are same-sex attracted...experience victimisation, harassment and abuse because of their sexual identity. Those who are open about their sexuality frequently experience abuse and rejection by family and friends. Consequently they do not feel safe about 'coming-out' [and] instead prefer to keep their feelings hidden. This silence can lead to self-harming behaviours including substance abuse, indiscriminate and unsafe sexual practices, running away and even suicide. Community ignorance, prejudice and discrimination are key contributing factors to the ongoing invisibility and isolation of [same-sex attracted youth]." <sup>65</sup>

A recent Australian study of same-sex attracted males found that:

Gay-identified youth were 3.8 times more likely [than their male heterosexual peers] to report making a suicide attempt, with 28.1% of gay youth reporting an attempt.

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<sup>64</sup> Lynne Hillier & Jenny Walsh, *Abused, silenced and ignored: creating more supportive environments for same sex attracted young people*, *Youth Suicide Prevention Bulletin*, No. 3, May 1999, Australian Institute of Family Studies, (available from [www.aifs.org.au/external/ysp](http://www.aifs.org.au/external/ysp)), at 23

<sup>65</sup> Brown, Rhonda (2002) *Self-harm and suicide risk for same-sex attracted young people: a family perspective*, *Australian e-Journal for the Advancement of Mental Health*, 1(1), <http://auseinet.flinders.edu.au/journal/vol1iss1/brown.pdf>

...Importantly the mean age of suicide attempt for gay-identified youth was between 15 and 17 years and the attempt occurred on average 2.2 years after self-identifying as gay, but 0.8 years before another person found out they were gay and 0.6 years before their first same-gender sexual experience.<sup>66</sup>

The findings of this Australian study have profound ramifications for the issue before the Standing Committee.

The authors of the study conclude that:

...youth suicide is not only a health issue, but a social issue. More consistent efforts to educate young people, their parents and the wider community toward greater tolerance and inclusion may greatly alleviate the isolation that many gay youth endure during adolescence and, consequently, protect many of them from feeling that death is preferable to being gay.<sup>67</sup>

It is important for the health of New South Wales youth that the criminal law not contribute to the negative stereotypes of homosexuality which same-sex attracted youth might internalise during the 'coming out' process.

By sending a message to both the community and same-sex attracted males – that gay teenagers are different or somehow less mature and worthy than their heterosexual peers – the criminal law stigmatises homosexuality and contributes to the isolation of young gay men in New South Wales.

### **5.3 Homosexuality, religion and the criminal law**

Most objections to reform of the age of consent in NSW are grounded in a deeply and sincerely held religious conviction that homosexuality is morally wrong.

However, it is not the role of the criminal law to entrench the moral sensibilities of some at the expense of others. As a former Chief Justice of New South Wales said:

The criminal courts are secular, and it is only by giving full significance to this that the criminal law can operate fairly across all members of the community, no matter what may be the particular religious persuasion, if any, of each individual Australian.<sup>68</sup>

It should also be remembered that the UN Human Rights Committee was not persuaded by moral argument in the face of law reform and moral diversity within Australia.<sup>69</sup>

Significantly, religious homophobia has been identified as an important risk factor in same-sex attracted youth suicide.<sup>70</sup>

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<sup>66</sup> Howard J, Nicholas J, Brown G and Karacanta A, *Same-sex attracted youth and suicide*, chapter 16 in Rowling L, Martin G & Walker L (editors), *Mental Health Promotion & Young People: Concepts & Practice*, McGraw Hill, Sydney, 2002, p.217

<sup>67</sup> Nicholas J & Howard J, *Better dead than gay? Depression, suicide ideation and attempt among a sample of gay- and straight-identified males*, *Youth Studies Australia*, Vol.. 17 No. 4, December 1998, p. 32

<sup>68</sup> *R v Cabill* [1978] 2 NSWLR 453 at 458 per Street CJ (in the Court of Appeal)

<sup>69</sup> Note 53 at [8.6]. See also "A discriminatory age of consent breaches the right to privacy" above on page 10.

<sup>70</sup> Macdonald R & Cooper T, *Young gay men and suicide: a report of a study exploring the reasons which young men give for suicide ideation*, *Youth Studies Australia*, Vol.. 17 No. 4, December 1998, p. 26.

**While respecting and upholding the right of everyone to practice and adhere to their religious faiths, the Councils for Civil Liberties do not believe that the religious views of some should be used to justify discrimination on the grounds of sexual orientation in the criminal law of New South Wales.**

## **5.4 Conclusion**

Ultimately, Parliament is faced with balancing the moral sensibilities and crusading of some on the one hand, and the welfare, well-being and lives of young men on the other. Other jurisdictions have an equal age of consent without any adverse effects. For over two decades, the State of Victoria has had an equal age of consent set at 16 years with a similarity of age defence of 2 years. NSW is now out of step with the law in the other States and the United Kingdom.

The Councils for Civil Liberties do not believe that it is the role of the criminal law, nor should it be the intention of Parliament, to support and reinforce homophobic attitudes that have been identified as important risk factors in same-sex attracted youth suicide.

The primary concern of Parliament in this area should be to protect and help young people, not make criminals of them, and to eliminate discrimination where it exists in our laws.

## 6. Bibliography

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### 6.2 UN Documents and Instruments

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### **6.3 Legislation**

*Crimes Act* 1900 (NSW)

*Crimes Amendment (Sexual Offences) Bill* 2002 (NSW)

*Acts Amendment (Lesbian and Gay Law Reform) Bill* 2001 (WA) (proclaimed 21/09/02)

*Crimes Act* 1900 (ACT)

*Crimes Act* 1958 (Vic)

*Criminal Code* 1899 (Qld)

*Criminal Code* 1913 (WA)

*Criminal Code* 1924 (Tas)

*Criminal Code* 1983 (NT)

*Criminal Law Consolidation Act* 1935 (SA)

*Human Rights (Sexual Conduct) Act* 1994 (Cth)

### **6.4 Case law**

*Chard v Wallis* (1988) 12 NSWLR 453

*R v Cabill* [1978] 2 NSWLR 453

*R v Gibbs* (NSW Court of Criminal Appeal, 18 June 1992, unreported)

*Toonen v Australia* [1994] PLPR 33 (see also citation above in “UN Documents”)