



No.29

Homosexual Law Reform in Australia

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Over recent years there has been a great deal of discussion concerning the appropriate role of the state in the regulation of private lives. Nowhere is this discussion more obvious than in the area of homosexual law reform.

At times, in both Queensland and Tasmania, an acrimonious public debate has occurred as a result of attempts to reform the laws relating to homosexual behaviour. Queensland has already passed legislation reforming its laws, and Tasmania, the last state or territory in Australia with strict legislation criminalising homosexual acts between consenting males, is expected to make similar changes in 1991.

This Trends and Issues examines the community's response to homosexual law reform and towards homosexuals generally. It is clear that even with law reform, significant discrimination still exists towards those who identify with the gay community.

The upsurge in public violence and discrimination against homosexuals is a deplorable feature of contemporary urban life. It reaffirms the need to monitor laws and social practices in this area continually.

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Homosexual behaviour between males has been illegal in most countries for several centuries. It was only in recent decades that a number of nations began to implement legislative reforms which allow for certain consensual homosexual acts. In Australia, most jurisdictions have responded to this trend and have decriminalised homosexual acts between consenting adults in certain circumstances. Most recently the Queensland State Caucus approved the amendment of legislation proscribing homosexual practices; however, in Tasmania the passage of this type of reform is still a matter for debate.

This Trends and Issues focuses primarily on issues surrounding the current status of laws addressing homosexuality throughout Australia. As in most countries throughout the world, the law relating to homosexual behaviour has traditionally applied only to males. Females have never come within the ambit of Australian statutes, nor has there ever been any attempt in Australia to introduce penalties for consensual lesbian behaviour. Lesbian acts with females under the age of consent are covered by provisions proscribing heterosexual acts with females under the age of consent. For this reason, the following discussion relates primarily to male homosexuality. It is important to note at the outset that to identify as homosexual has never been an offence in any Australian jurisdiction; it is homosexual acts which have

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been outlawed, and indeed remain criminal offences in Tasmania.

Homosexual Laws

In 1972 South Australia became the first Australian jurisdiction to decriminalise some homosexual acts. Further reforms in this state were achieved in 1975 and 1976. In 1976 and 1980 respectively the Australian Capital Territory and Victoria followed suit and decriminalised some aspects of homosexual behaviour. The Northern Territory became the next jurisdiction to decriminalise consensual homosexual acts between men in 1983, with New South Wales following the trend in 1984. Western Australia became the most recent jurisdiction to implement legislative reforms in 1989. The legislation of Western Australia provides a curious preamble which begins by acknowledging the inappropriateness of the criminal law to intrude on people's private lives, but ends with a condemnation of homosexual acts. An unfortunate result of the Western Australian provisions, intended to decriminalise homosexual practices, is the extension of express government policy to condemn lesbianism.

The legislation in these jurisdictions differs considerably. However, it has as a common feature the decriminalisation of some homosexual acts between consenting adults in private. The legislation provides a minimum age of consent at which homosexual behaviour is allowed, and incorporates provisions which are designed to protect those who are under this age or mentally impaired from exploitation. Also contained are provisions to protect people from acts to which they have not consented.

In Queensland, the Fitzgerald Report (Queensland 1989, p. 377) recommended that the Criminal Justice Commission review the laws governing voluntary sexual behaviour. As a result on 21 November 1990 the Queensland State Caucus decided to amend the Criminal Code and the *Criminal Law (Sexual Offences) Act*

1978-1989 to decriminalise consensual sexual activity between adult males in private. It approved the introduction of appropriate legislation, setting the age of consent at 18, while reaffirming its determination to enforce its laws prohibiting sexual interference with children and intellectually impaired persons and non-consenting adults. The introduction of legislation includes a preamble noting that there are limits to the power of the state to intervene in the private lives of its citizens and that it is not the role of the Parliament to condone or condemn the subject of the legislation (Wells 1990).

In Tasmania, reform of homosexual laws was attempted unsuccessfully after recommendations contained in the report of the Tasmanian Law Reform Commission (1982) were presented to Parliament. The report included recommendations to remove homosexual offences from the *Criminal Code Act 1924*. However, the Upper House rejected these recommendations. The only reform made to laws regarding homosexual acts in Tasmania was a change in the terminology in section 122 of the Criminal Code 1924 from 'unnatural carnal knowledge' to one of 'unnatural sexual intercourse'. The Accord between the Labor Party and the Green Independents, which was signed on 29 May 1989, provides for decriminalisation of consensual homosexual acts in private. Draft legislation went to Cabinet in mid-May in the form of the *HIV/AIDS Prevention Measures Bill 1990*. It was considered in conjunction with amendments to the Criminal Code which would decriminalise homosexual acts between consenting adults in private. However, at the time of writing, the tabling of the Bill had been temporarily deferred. The Clauses are contained within a Bill which addresses legal impediments to HIV prevention and treatment. According to commentators, if the Bill is passed, homosexual law reform in Tasmania will be achieved in the context of public health measures, rather than, as other Australian Parliaments have done, in Acts which

acknowledge that laws against consensual sex between adults are unjust and archaic (Carr 1990, p. 31). Instructions have been given to Parliamentary Counsel to draft anti-discrimination legislation intended for introduction in the Autumn 1991 session. Discrimination on the grounds of a person's sexuality will be unlawful. (See Table 1 for a summary of the homosexual laws in Australia.)

Equal Opportunity Legislation

The equal opportunity legislation in New South Wales¹ and South Australia² covers discrimination

which is related to sexual activity or sexual preference. This legislation applies equally to males and females. In these states a reference to a person's homosexuality includes a reference to the person being thought to be homosexual, even if the person is in fact not homosexual. In Western Australian and Victorian equal opportunity legislation discrimination on the basis of homosexuality is not covered. In Victoria an attempt was made in 1985 to extend the definition of 'private life' under the *Equal Opportunity Act 1984* to include 'engaging in or refusing to engage in any lawful sexual activity or practice', but this amendment to the legislation was defeated in Parliament (Australia and New Zealand Equal Opportunity Law & Practice 1984, p. 9-080). The Victorian Law Reform Commission

1. *Anti Discrimination Act 1977* (NSW) (as amended by *Anti-Discrimination (Amendment) Act 1982* (see Part IVC). In New South Wales it is unlawful to discriminate on the ground of homosexuality in the areas of: employment, partnerships, trade unions, qualifying bodies, employment agencies, education, provision of goods and services, accommodation and registered clubs.

2. *Equal Opportunity Act 1986* (SA). In South Australia it is unlawful to discriminate on the ground of sexuality. 'Sexuality' is defined in the *Equal Opportunity Act* as meaning heterosexuality, homosexuality, bisexuality or transsexuality. It is unlawful to discriminate on the ground of actual or presumed sexuality in: employment, education, provision of goods and services and land and accommodation. An exception may apply in employment situations where appearance and manner of dress are relevant.

State / Territory	Private Homosexual Acts	Public Homosexual Acts	Age of Consent
New South Wales <i>Crimes Act 1900</i> <i>Crimes (Amendment) Act 1984</i>	Not an offence	The legislation makes no distinction between public and private homosexual acts ⁺	18 years. Offences for under age, s.78H,I,K,L,Q of the <i>Crimes Act 1900</i> as amended by the <i>Crimes Amendment Act 1984</i>
Victoria <i>Crimes Act 1958</i> <i>Crimes (Sexual Offences) Act 1980</i>	Not an offence	The legislation makes no distinction between public and private homosexual acts ⁺	18 years. Offences for under age, ss.47,48,49,50 of the <i>Crimes Act 1958</i> as amended by the <i>Crimes (Sexual Offences) Act 1980</i>
Queensland <i>Criminal Code Act 1899</i>	Not an offence	An offence s.208,209,211	18 Years
Western Australia <i>Criminal Code 1913 Law Reform (Decriminalization of Sodomy) Act 1989</i>	Not an offence	Gross indecency between males in public an offence s.184	21 Years Offences for under age, ss.185, 187(1) & (2) of the <i>Criminal Code 1913</i> as amended by the <i>Law Reform (Decriminalisation of Sodomy) Act 1989</i>
South Australia <i>Criminal Law Consolidation Act 1913</i> <i>Criminal Law (Sexual Offences) Amendment Act 1975</i> <i>Criminal Law Consolidation Act Amendment Act 1976</i>	Not an offence	The legislation makes no distinction between public and private homosexual acts ⁺	16 Years Offences for under age, s.49 of the <i>Criminal law Consolidation Act 1913</i> as amended by the <i>Criminal Law (Sexual Offences) Amendment Act 1975</i> and <i>Criminal Law Consolidation Act Amendment Act 1976</i>
Tasmania <i>Criminal Code Act 1924</i>	An offence ss.122,123	An offence ss.122,123	
Northern Territory <i>Criminal Code Act 1983</i>	Not an offence	Carnal knowledge or gross indecency between males in public or in any public place is an offence s.127*	18 years. Offences for under age, s.128
Australian Capital Territory <i>Law Reform (Sexual Behaviour) Ordinance 1976</i> <i>Crimes Act 1900 (NSW)**</i>	Not an offence s.3	An act done in a public lavatory is taken to be not in private, <i>Law Reform (Sexual Behaviour) Ordinance 1976</i> s.2(3)	18 years. Offences for under age, <i>Law Reform (Sexual Behaviour) Ordinance 1976</i> s.4 (1) & (2)

+ In these jurisdictions homosexual acts in public places would be dealt with under offensive behaviour provisions in legislation which also applies to heterosexual behaviour in public places.

* In the Northern Territory the definition of "in private" provided by section 126 of the *Criminal Code Act 1983* is "with only one other person present and not within view of a person not a party to the act". "In public" means "with more than one other person present or within the view of a person not a party to the act".

** When a person is charged under ss.79, 80 or 81 of the *Crimes Act 1900 (NSW)*, the court shall not find the offence has been established unless under s.5(c) of the *Law Reform (Sexual Behaviour) Ordinance 1976* that the act alleged to constitute the offence was committed otherwise than in private.

is currently reviewing the need for the inclusion of such provisions in the Victorian legislation and legislation to prohibit discrimination on the grounds of sexuality is likely to be introduced into the Victorian Parliament this year (Hodge et al. 1990, p. 48). The Northern Territory is also reviewing the need for individual equal opportunity legislation. It is expected that this legislation, which will probably come into force in late 1990, will include provisions which guard against discrimination on the ground of sexual preference.

In other jurisdictions, which do not have separate equal opportunity

legislation, the *Commonwealth Human Rights and Equal Opportunity Commission Act 1986* applies. Regulation 4 of this Act contains provisions against distinction, exclusion or preference on the ground of sexual preference or former sexual preference. These regulations came into effect in January 1990 and were legislated under the terms of the International Labour Organisation Convention no. 111. The effect of these regulations will be to allow the Human Rights and Equal Opportunity Commission to receive and investigate complaints of discrimination in employment or

occupation on the ground of sexual preference. The Commission is able to conciliate complaints and report to the Attorney-General in respect to any discriminatory practice or ground found. These include acts or practices of Commonwealth, state and private employers. The declaration does not, however, make these practices unlawful.

The Federal *Family Law Act 1975*, with respect to guardianship and custody of children in Part VII, has been interpreted by the Family Court in such a way that it is clear that homosexuality is not a disqualifying factor with regard to the custody of a child (*see O'Reilly (1977) FLC 90-685; Spry (1977) FLC 90-271; Schmidt (1979) FLC 90-685; Shephard (1979) FLC 90-729*).

The Debate

Against Homosexual Law Reform

Those who oppose homosexual law reform do so for a variety of reasons. Submissions to the Queensland Criminal Justice Commission's Parliamentary Committee indicated that there are a number of vocal opponents of homosexuality. This opposition often has a theological base centred around the belief that

homosexuality is a sin, and that any act which is contrary to the natural order is against the will of God; and since the 'obvious' function of the sexual act is the consummation of Christian marriage and procreation, homosexual acts should be considered against the natural order (Wilson 1971, p. 50).

Some clergy argue that there is no distinctions between the moral code of society and criminal law; that the moral code of society should be expressed in its criminal law. 'The English common law on which our civil and criminal law is based finds its source, to a great extent, in Biblical law.' Thus the criminal law should express 'God's revealed standards' as expressed in the verses of the Bible which condemn homosexual acts (Percy quoted in Parliamentary Criminal Justice Committee 1990, pp. 106-10).

Religious opponents also argue that anti-discrimination legislation regarding homosexual behaviour discriminates against all those who hold traditional Christian views by forcing them and (through education programs) their children to accept the subjective, judgmental view that homosexuality is a normal and/or good mode of sexual expression (Lansdown 1984, p. 157).

The arguments most frequently put forward by religious opponents are best presented by way of a summary of the points expressed in the submissions by representatives of the Baptist, Presbyterian and Lutheran churches to the Queensland Criminal Justice Commission's Parliamentary Committee:

- The incidence of homosexuality will increase;
- The incidence of AIDS and other sexually transmitted diseases will dramatically increase;
- Homosexual acts are physically unnatural;
- Homosexuality will be encouraged in schools;
- Homosexuality is contrary to the interests of society;
- Decriminalisation will endanger the welfare of children;

- Decriminalisation will lead to the acceptance and proliferation of sexual 'perversion' in society;
- Decriminalisation will result in moral instability and the downfall of society;
- Homosexual acts are a sin and detestable to God.

Despite the religious foundation of these arguments, there are members of the clergy who are inclined to believe that the problem is a social one, and since homosexual behaviour poses no threat to society there is no justification for its being considered a crime against the state. Thus some churches, most notably the Metropolitan Community Church in Brisbane, the Religious Society of Friends, the Anglican Church and the Uniting Church, have expressed support for homosexual law reform (Parliamentary Criminal Justice Committee, Queensland 1990).

In the following section these views are considered in the context of research findings.

For Homosexual Law Reform

One of the main concerns of opponents of decriminalisation is the fear that homosexuality will become more prevalent and more public. The research findings do not, however, support this fear. In 1976 Geis, Wright, Garret and Wilson surveyed a number of homosexuals, district attorneys and police officials in the seven states in the United States which had decriminalised homosexual acts. Those surveyed noted that there had been no changes in the involvement of homosexuals with minors, use of force by homosexuals or the amount of private homosexual behaviour. Geis et al. necessarily relied on the opinion of homosexuals, attorneys and police rather than on behavioural changes.

Another of the arguments levied against the decriminalisation of homosexual acts is that these practices fail to produce children and this could lead to the 'downfall of society'. There is little support for such a belief. In Italy, where homosexual acts are not

illegal, there appear to be no deleterious effects on society: it would be difficult to argue that the status of the family had been undermined, or that there had been any significant reduction in population. In *The Sexual Dilemma*, Wilson adds that many heterosexuals do not procreate and are not for this reason considered a threat to society; thus there should be no such implication concerning homosexuality (1971, p. 53).

In response to the argument that the incidence of AIDS (and other sexually transmitted diseases) will dramatically increase, it has been alleged that the former attitude of the Queensland Government towards homosexuality seriously restricted any response to the AIDS crisis. Bill Rutkin of the Queensland AIDS Council suggests that

[t]here can be no serious doubt that lives have been lost in Queensland because of the laws...If there had been State government support for education and behavioural change programs for gay men then, from November 1984, it would not be unreasonable to claim that 25 per cent of the cases of AIDS we now have wouldn't have occurred (Leser 1990, p. 51).

Figures from the National Health and Medical Research Council provide some support for this belief. As of June 1990, there were 892 known cases of HIV infection in Queensland. Eighty people had already died from full-blown AIDS. To make a comparison - Queensland has twice the population of South Australia, but more than twice the rate of HIV infection and more than twice the death toll (Leser, 1990, p. 51).

Sinclair and Ross (1985) have compared two populations of homosexual men which are similar apart from living in 'criminalised' and 'decriminalised' jurisdictions. The jurisdictions chosen were South Australia and Victoria. A questionnaire was used to obtain homosexuals' views in these states. At the time of data collection (1979-80) Victoria had a maximum penalty of 20

years for homosexual acts between males, while the South Australian law had been repealed in 1975. The findings of this study suggested that there were few if any negative consequences of decriminalising homosexual practices. It appears that the positive consequences of decriminalisation include an improvement in the psychological adjustment of homosexual men and a decline, within the gay community, in the incidence of sexually transmitted diseases and public solicitation.

The Criminalisation of Homosexuality

In *The Honest Politician's Guide to Crime Control*, Morris and Hawkins cogently argue that 'the prime function of the criminal law is to protect our persons and our property', and that it is 'improper, impolitic, and usually socially harmful for the law to intervene or attempt to regulate the private moral conduct of the citizen' (1970, pp. 4-5).

Nevertheless, in Australia, it is primarily this end that laws regulating homosexual behaviour endeavour to achieve. However, it is evident, as these authors also argue, that the criminal law is 'a singularly inept instrument for that purpose'. Laws intended to prevent homosexual behaviour are virtually impossible to enforce, and rather than protect society and individuals they, in effect, discriminate against a significant [homosexual] minority in the Australian population.

Homosexuality has existed in most societies throughout history, and despite regular attempts, it is apparent that it cannot be legislated out of existence. A homosexual presence in the community is a fact of life and, even though it may challenge popular and deeply held moral beliefs, there is no justification for continued discrimination against this group. Legislation which singles out 'homosexuals' or differentiates between homosexual and heterosexual acts makes a mockery of our social values of minority and individual

rights; and as a consequence raises important questions regarding the proper scope of the criminal law. As the Commission of Inquiry into the Queensland Police (The Fitzgerald Report) put it:

Laws should reflect social need, not moral repugnance. Unless there are pressing reasons to do so, it is futile to try and stop activities which are bound to continue and upon which the community is divided... Where the moral issue is one upon which there is room for seriously 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 and defenceless that their involvement is not truly voluntary (Queensland 1989, p. 186).

Despite this belief among legal commentators the law in most Australian states does not take a neutral stance, but continues to treat homosexual acts as qualitatively different from heterosexual acts. The effect of criminal sanctions against homosexual behaviour include violence against homosexuals, blackmail, police intimidation and entrapment, reluctance by homosexual men to report rapes or other crimes for fear that it will implicate them with homosexual activity, adverse psychological effects which may eventually result in suicide, and the inability to acknowledge freely and express sexual preference without fear of social oppression, stigmatisation and ridicule. Information obtained from representatives of the gay communities in New South Wales and Victoria, where law reform has taken place, suggests that many of these problems and feelings are sustained even after legislative change. This calls into question the value of the reforms, made in some states, aimed at achieving equality or alleviating the problems experienced by the

homosexual community. Laws making homosexual acts illegal and/or marking a difference between homosexual and heterosexual acts, do not stop men having sex with men, but drive a minority underground, render them liable to blackmail, violence, scapegoating, discrimination, and cause immeasurable human suffering.

Blackmail

Blackmail of homosexuals or bisexuals by persons with whom they have had a sexual relationship refers to both the possible reporting to police and possible discrimination in the workplace. As early as 1953 the Wolfenden report observed that 32 of the 71 cases of blackmail reported to the police in England and Wales during 1950-53 were connected with homosexual activities (Committee on Homosexual Offences and Prostitution 1962, p. 40). It is extremely difficult for a homosexual who is being blackmailed to seek assistance from the police. A homosexual of high social and professional status stands to lose a great deal should his sexual practices become public knowledge or be brought to the attention of the law. The victim is thus reluctant to bring a complaint against the blackmailer.

Discrimination

Individuals in the gay community experience the social world in a different way to those in the heterosexual community. Everyday socially acceptable actions become outlawed and justifiable reasons for discrimination in employment, law enforcement (discussed in greater detail below), and limited access to community services - for example, public moneys granted to minority groups for self-development and special education projects are not readily available to gay communities. Similarly, lack of support and social stigma ensures that problems of domestic violence tend to be hidden within the homosexual community as noted in a study of violence within lesbian relationships (*see* Renzetti 1990). The lesbian community is reluctant to address openly issues that

could be used to fuel heterosexual stereotypes and anti-lesbian sentiments, especially when abuse of a woman by another woman contradicts the widely held belief that physical violence is a male or patriarchal problem, and discussing the issues also threatens the ideals of the community. Consequently, sources of help available to heterosexual victims of violence are not perceived as being available to lesbian victims. This feeling is reinforced by the experience of those who do seek assistance and generally find it to be of little or no help at all.

Law Enforcement

It is clear from the evidence available that laws on homosexuality are characterised by arbitrary enforcement (Australian Federation of AIDS Organisations 1989, p. 11), and that there is considerable variation between Australian jurisdictions in police enthusiasm for detecting and prosecuting homosexual offences (Wilson 1971, ch. 3). It is evident that police focus most of their attention on public displays of homosexuality. Homosexuals themselves note that:

Police very rarely arrest people for gay sex in private, eg in your own home. Although we do know of a few cases where men have been charged after they admitted to the police that they had gay sex in private. Most of the arrests of gay men - a couple of hundred a year - are for hanging around a street or park trying to meet other gays, or for having sex in places like cars parked in secluded spots (Walsh 1978, p. 42).

A 1978 study by the New South Wales Bureau of Crime Statistics and Research provides empirical support for this argument in its findings that the bulk of prosecutions for homosexual offences are for public acts of some kind (New South Wales Bureau of Crime Research and Statistics 1978, p. 38). Private offences attracted prosecutions mainly when minors or coercion was involved.

In gathering evidence for prosecutions for offences by homosexuals in public places, police have been known to use decoys or agents provocateurs in a method known as 'entrapment'. In Queensland a number of charges against homosexuals in 1988 were a consequence of this technique (Lane 1988, p. 155). Most of the men were detected in semi-public places such as the Brisbane Transit Centre shower and lavatory complex. Lane (1988, p. 156), in his examination of transcripts and statements of prosecutions of homosexuals in Brisbane, found that police have used peep holes cut between adjoining shower cubicles to observe the behaviour of occupants and in some cases invite a response. Most of the cases have made use of a young, stylishly dressed officer purporting to be available for casual liaison. The Australian Federation of AIDS Organisations (1989 p. 18), in their conversations with homosexual men, alleged that police in Western Australia (prior to decriminalisation) adopted similar tactics.

Police agencies often justify the use of enforcement and entrapment techniques by the argument that without appropriate reinforcement techniques, male homosexual activities in public places would be a common spectacle (Green 1970, p. 50). Contrary to this belief, Laud Humphreys (1970, p. 88) in his study of male homosexual activity in public lavatories, *Tea Room Trade*, found that men who frequented 'tea rooms' (public lavatories) for sexual purposes were remarkably discreet in their behaviour. Similarly, the New South Wales Bureau study mentioned above (1978, p. 38) found that although public acts accounted for the bulk of prosecutions, the risk of the public observing such offences is less than the figures suggest. The most common prosecutions for these offences were alleged to have been committed within a closed toilet cubicle and could only have been observed with considerable difficulty and a degree of deliberateness on the part of the observer.

In the United States entrapment is a defence to a criminal charge. Although Australian courts have expressed considerable distaste for the practice, there is no specific legislation to curb it (Lane 1988, p. 156). However, under Australian law a trial judge does have a discretion to exclude evidence unfairly or improperly obtained (*see R v. Ireland* (1970) 126 CLR 321; *Burning v. Cross* (1978) 141 CLR 54; *Cleland v. R* (1982) 151 CLR 1 cited in Lane 1988). Recent supreme court decisions also show that this discretion is applicable in some circumstances to evidence obtained by entrapment (*see R v. Vuckov and Romeo; R v. Romeo; R v. Romeo* 1987 45 SASR 212; *see also* Street CJ in *R v. Dugan* (1984) 2 NSW LR 554). In the cases of entrapment in Queensland mentioned above, the defendants, faced with public embarrassment, pleaded guilty after committal (Lane 1988, p. 157). However, judges in Queensland generally imposed mild penalties, ranging from finding an offence proved without recording a conviction to convictions and bonds (Australian Federation of AIDS Organisations 1989, p. 18).

The issue here is not whether homosexuals should be allowed to conduct sexual liaisons in public toilets, it is the manner in which charges are brought against them. Police could have stopped this behaviour by sending regular patrols into designated areas, rather than utilising the practice of entrapment (Australian Federation of AIDS Organisations 1989, p. 18).

Violence

Violence against homosexuals is nothing new; but a recent increase in the intensity of assaults against this group is a cause of major concern. Stories of violence against lesbians and gay men appear frequently in the popular press, and in practically every issue of gay community papers. On 4 March 1990, *The Sun Herald*, reporting the alarming rate of violence experienced by the homosexual community in Sydney indicated that

'packs - of up to 15 youths - are responsible for 30 attacks each week'; while *The Age* published a story in a similar vein: between January and March of 1990 one murder and more than 30 bashings had been reported in Sydney's inner city area (29 May 1990).

In general this type of violence is intended to be directed towards homosexuality, and the victim is a fairly arbitrary choice. The presumption that someone is homosexual is sufficient to set off a violent attack, this presumption may be founded on as little as the victims geographic location. The initiative to carry out a violent attack comes from the perpetrators, with the victim being taken unawares - as a rule because of this unexpectedness the victims are not able to react immediately in an effective manner. '[T]hey don't fight back' and this feeds the prejudice that they are just defenceless victims - not real men (van den Boogaard 1989, p. 55). It is the unexpectedness of the situation that makes them defenceless.

Until recently, there has been a general lack of interest in the nature of this violence. Causes for anti-homosexual violence are usually presented in general terms like anti-homosexuality or homophobic, or they are ascribed to economic factors - robbery and blackmail. However if it is true, as one study (van den Boogaard 1989, p. 54) suggests, that the perpetrators of violence surmise homosexuality only after observing inter-male behaviour in areas where homosexuals are likely to be encountered, violence against homosexuals could be an indication of sexual confusion experienced in the passage to manhood. The youthful perpetrators may be expressing their own uncomfortable feelings regarding their contacts with men, which could arise as a result of conflict between their boyhood experience of friendship and newly adopted rituals of manhood. This is not to say that the attackers are covertly gay - though that may be the case - but that the violence could be a consequence of male adolescent sexual confusion.

As a response to the increasing violence in Sydney, the Gay and Lesbian Rights Lobby has initiated strategies to combat hate related attacks. One of these strategies is *The Streetwatch Report* (Cox 1990); a survey of 67 victims of gay-bashing in the Sydney metropolitan area. It provides information on the nature of the assaults, the survivors, the assailants, and also the possible reasons for the recent increase in offences of this kind. Some of the more disturbing findings in the report were that the motivation for the attacks is hate against lesbians and gays, robbery was not a major feature; and the assailants were predominantly youths or young adults (86 per cent under 31) who generally attacked in gangs of four and frequently more. Victims were reluctant to report to the police - a report rate of only 48 per cent suggests that despite some changes in police attitudes in recent years, a major section of the population still feel unable to avail themselves of their rights to protection under the law. Only 56 per cent of those who did report were satisfied with the service offered by the police; 73 per cent of survivors sustained serious physical injury; 52 per cent of attacks took place on the street, and 60 per cent of the attacks occurred in Darlinghurst and Newtown. The information available from other states and territories suggests that anti-homosexual violence is not exclusively a Sydney phenomenon.

Scapegoating

As a community we frequently seek scapegoats for the explanation of 'social ills'; at times homosexuals have fulfilled this role explaining increasing promiscuity, 'sexual perversion', 'corruption', and most recently the spread of the AIDS virus. The most glaring examples of these feelings are apparent in the Queensland popular press where claims are granted credibility by publication in major newspapers, for example, there have been claims that 'Gays are creators of misery and death...', calls for homosexuals to be made to wear identification tags in

public and to undergo counselling to correct their 'depravity' (*The Courier-Mail*, 13 June 1990), and suggestions that 'it was in the political interests of gay rights activists that AIDS should spread quickly into the general community...For only when it spreads to the community at large will homosexuals be able effectively to conceal that AIDS is a consequence of homosexual behaviour.' (*The Sun*, 13 June 1990). Echos of these sentiments are also identifiable in some of the moral and religious commentaries on homosexual law reform aired in other states.

Homosexuality and AIDS

As previously mentioned, since the early 1980s opponents of homosexual law reform have frequently cited AIDS as a justification for continuing to criminalise homosexual behaviour. Figures available in February 1990 suggest that over 88 per cent of those who have died from AIDS in Australia have been homosexual or bisexual men (National Centre in HIV Epidemiology and Clinical Research 1990). To date, there are no studies which provide evidence as to the impact of decriminalisation on AIDS.

Proponents of homosexual law reform argue that laws criminalising homosexual acts seriously impede public health programs which educate and promote safe sex practices among the general community and particularly those at risk of developing AIDS (Australia 1989). A 1989 consultation paper by the Department of Community Services and Health (Australia 1989, p. 8) recommended:

That laws criminalising consensual adult homosexual acts in private be repealed. The age of consent for homosexual activity should be the same as for heterosexual activity (Australia 1989).

The paper, which was compiled after a series of consultative panels throughout Australia, suggested that many of the people who appeared before the panels argued that the illegal nature of homosexuality in

some states created a barrier for workers attempting to carry out education and prevention programs with homosexual groups. Many people expressed concern at having their names on lists of organisations, such as AIDS Councils, which could be seized by police and used as evidence in prosecutions or lead to disclosure of their activities to employers or others. Regardless of whether these fears are founded, it causes the workers concern and as such may hamper AIDS prevention. People appearing before the panels also pointed to the success of gay education and HIV prevention programs in states which had decriminalised homosexual acts (Australia 1989, pp. 7-8). Lane (1988, p. 15) argues that while the AIDS factor has become a justification for the harassment of homosexuals, in fact 'nothing could be more effective in hindering official attempts to uncover and control the disease than a witch-hunt against one of the high risk groups'.

The Australian Federation of AIDS Organisations (1989) has argued that the criminal status of homosexual behaviour leads to difficulties at two levels, the public and the personal. At the public level these difficulties involve restrictions placed on the nature of programs and services offered to those at risk because the government cannot be seen as supporting or encouraging illegal activity. At the personal level individuals will be unlikely to have confidence in services which they might otherwise use if they fear there may be negative repercussions at a later date. In addition, problems of status may detrimentally affect some individuals' views of their own self-worth which will have implications for the value they place on maintenance of good health (Australian Federation of AIDS Organisations 1989, p. 19).

The Queensland AIDS Council has conducted research which has revealed that significant numbers of men do not have an HIV antibody test until they are physically unwell, or they test interstate. The most significant reason given for this was

fear of prosecution by Queensland authorities and a total mistrust of Queensland government guarantees regarding medical confidentiality (Queensland AIDS Council, 1988). In Western Australia similar research conducted by the Western Australian AIDS Council (prior to decriminalisation) revealed similar fears by homosexual men in this state. Some of the men attending the sexually transmitted diseases clinic in Western Australia suggested that they generally give false names or only a first name due to insecurity regarding the potential use of clinic files (Western Australia 1988). In Tasmania this pattern is repeated; however, in this state the situation has been worsened by highly placed medical practitioners and politicians who have made anti-homosexual statements. The prevailing view in this state is that homosexual men are reluctant to admit their status and would prefer not to be tested for AIDS in Tasmania. This environment ensures that health promotion information is not freely distributed (Australian Federation of AIDS Organisations 1989, p. 21).

Public Opinion

In Australia the use of opinion polls to determine the views of the populace on a particular subject has become increasingly popular. The results of a nationwide survey on homosexuality conducted by Wilson and Chappell in 1967 indicated that the majority of respondents disapproved of the legalisation of male homosexual activity between consenting adults (Wilson & Chappell 1968, pp. 7-17). Prior to the decriminalisation of the homosexual act in South Australia in 1974 the Morgan Research Group conducted a nationwide survey to gauge public attitudes to this proposed change in the law. The results of the survey showed that 54 per cent of Australians supported homosexual law reform, while only 20 per cent believed that 'homosexuality' should be illegal (20 per cent were undecided). In 1989 the same survey

was repeated by the Morgan Research Group with the results again indicating that the majority of respondents (58 per cent) believed that homosexual acts between consenting adults in private should be legal. (Thirty-four per cent believed it should be illegal and 8 per cent were undecided). Given the fact that the 1974 survey preceded the advent of AIDS, it appears that the incidence of this disease is not as high profile a concern in the community as some opponents of law reform would have us believe (Queensland 1990, p. 15).

Changing the Law

Passing laws is easier than trying to alter people's behaviour by tackling their attitudes. Old prejudices and attitudes take some years to change. In fact, in the states where legislation has been changed the delay is apparent; disadvantage is still experienced by homosexuals. New attitudes are needed; hopefully making the appropriate changes to the law will facilitate an environment in which these can develop.

Jurisdictions yet to, or in the process of instituting law reform regarding homosexual acts should consider the following guide-lines: provisions involving carnal knowledge against the order of nature and gross indecency between males should be repealed; there should be no inconsistency between 'Age of Consent' provisions involving homosexuals and heterosexual intercourse; and the enforcement of less obvious mechanisms which utilise general provisions circumscribing behaviour in public must be reanalysed and police instructed as to what is acceptable use of power and what is misuse.

Generally, homosexual law reform in English-speaking countries has followed the form of decriminalising homosexual acts between consenting adults in private. There will always be a need to retain provisions 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 - provisions still need to be made in the Code to protect victims of non-consensual homosexual acts. To this end, certain sections of the Code need to be gender-neutralised so that they can apply equally to males and females.

There are still serious problems experienced in states which have already implemented changes. To resolve these problems and avoid the absurd situation where the legality of a person's sexual preference - or the expression of this sexual preference—depends on nothing more rational than the state or territory in which the individual concerned happens to reside, there needs to be some consistency in reform throughout Australia. In addressing these issues states and territories need to consider the areas where inconsistency persists; primarily the regulation of the 'Age of Consent' and the public/private distinction.

Age of Consent

There should be no difference in the 'Age of Consent' for males and females in relation to heterosexual or homosexual acts. The Queensland Psychologists for Social Justice indicated in their submission to the Parliamentary Criminal Justice Committee (Gallois, North & Raphael 1990) that research, and clinical experience support the proposition that young males start sexual activity earlier and are more likely to have more sexual partners than girls at any given age through the teenage years. Thus to legislate differently on the 'Age of Consent' for homosexual acts ignores the realities of sexual expression and sexual identity formation. In a letter to the Premier of Queensland, the Honourable Wayne Goss, several Queensland academics argue further:

...that any distinction made in age of consent for homosexual activity and the age of consent for heterosexual activities would be

discriminatory and prejudicial...The dangers exist in that any differentiation, in age of consent....further reinforces negative social constructions and public opinion. Such legislative differentiation will ensure that young homosexuals in Queensland will continue to face the monumental task of developing a positive self identity and acceptance of social responsibility in relations to AIDS and public health (personal communication to the Honourable Wayne Goss from Gallois, North, & Raphael 1990).

The recommendations regarding 'Age of Consent' finally proposed by the Queensland Parliamentary Criminal Justice Committee concur with these views.

Public and Private Distinction

South Australia and Victoria make no mention of this in their legislation controlling homosexual conduct. In those states a homosexual offence is only an offence in the same circumstance as a heterosexual act is in public. There is no reason that it should be otherwise.

Although homosexual law reform has had a high profile on the recent political agenda, and changes - in legislation and public opinion - are in train, there is still a long way to go. Achieving consistent law reform in the last frontiers, Queensland and Tasmania, is a significant step in alleviating legislative discrimination against the homosexual community in Australia.

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