

## CONSULTATION PAPER

### EQUALISING THE AGE OF CONSENT

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Since 2003, Queensland has been the only Australian jurisdiction to maintain unequal ages of consent between male homosexuals and male heterosexuals. The LGBTI Legal Service has taken the preliminary view that this differential treatment must be addressed by the Queensland Parliament because:

- the law indirectly discriminates against young gay men, so violating their human rights; and,
- the law endangers young gay men in a physical, emotional and legal sense.

Accordingly, the LGBTI Legal Service has prepared this Consultation Paper to briefly set out the issue of unequal ages of consent, and to invite submissions from stakeholders, community organisations and members of the public.

#### 1. The law in Queensland

In Queensland, two offences determine the age at which persons can consent to sexual intercourse. Section 215 of the *Criminal Code* prescribes that it is an indictable offence for a person to have sexual intercourse<sup>1</sup> with a child aged under 16.<sup>2</sup> Section 208 of the *Criminal Code* prescribes that it is an offence of “unlawful sodomy” for two persons, one of whom is aged under 18, to engage in anal intercourse.<sup>3</sup> The maximum penalty for “unlawful sodomy” without an aggravating feature is 14 years imprisonment—equal to the maximum penalty for heterosexual intercourse with a child aged under 16 but above 12.<sup>4</sup>

The effect of the two offences is that the age of consent for vaginal sex is 16, whereas the age of consent for anal sex is 18. In reality, this means that it is lawful for heterosexuals to engage voluntarily in penetrative sexual intercourse from age 16, whereas it is unlawful for male homosexuals to engage voluntarily in penetrative sexual intercourse until age 18.

##### 1.1 Comparison with other jurisdictions

In all other jurisdictions the age of consent for any manner of sexual intercourse is 16,<sup>5</sup> except in South Australia and Tasmania where it is 17.<sup>6</sup> Unlike any other jurisdiction, Queensland also makes it an offence to “permit” another person, under 18, to having anal intercourse with them.<sup>7</sup>

<sup>1</sup> The provision actually uses the words “carnal knowledge” which is defined in s 6(2) as including “sodomy.” However, s 215(6) excludes “sodomy” for the purposes of that section. “Sexual intercourse” is defined separately in *Criminal Code 1899* (Qld) s 229D(1).

<sup>2</sup> *Criminal Code 1899* (Qld) s 215(1).

<sup>3</sup> *Criminal Code 1899* (Qld) s 208(1)–(2).

<sup>4</sup> *Criminal Code 1899* (Qld) ss 208(1), 215(3).

<sup>5</sup> *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66C; *Criminal Code 1983* (NT) s 127(1); *Crimes Act 1958* (Vic) s 45; *Criminal Code Act 1913* (WA) s 321.

<sup>6</sup> *Criminal Law Consolidation Act 1935* (SA) s 49(3); *Criminal Code 1924* (Tas) s 124.



Internationally, Queensland joins only Canada,<sup>8</sup> Chile<sup>9</sup> and Greece<sup>10</sup> in the 33-member Organisation of Economically Developed Countries to retain a discriminatory age of consent.<sup>11</sup> Accordingly, Queensland lags behind not only all other Australian jurisdictions but also behind most of the developed world in retaining the offence of “unlawful sodomy.”

### *1.2 Rarity of prosecution*

Though it is a crime, “unlawful sodomy” is rarely prosecuted.<sup>12</sup> There are no reported cases of persons being prosecuted for “unlawful sodomy” where anal intercourse is consensual. However, youth justice conferences have been arranged for young children who have been charged with “unlawful sodomy”<sup>13</sup>

However, even if rarely prosecuted, “unlawful sodomy” should be reviewed. Mostly importantly, it leaves its available for arbitrary and unexpected use. Its mere status as a crime creates for young homosexual males an invidious dilemma: abstain from homosexual intercourse until 18 and respect the law, or engage in homosexual intercourse and expose oneself to prosecution. Also, the retention of “unlawful sodomy” represents a public declaration that male homosexual intercourse is criminal and immoral.<sup>14</sup>

<sup>7</sup> *Criminal Code 1899* (Qld) s 208(1)(b).

<sup>8</sup> See, *Criminal Code* RSC 1985, c C-46, s 159. But note, in several jurisdictions this provision has been declared unconstitutional. See eg, *R v M(C)* 98 CCC (3d) 481 (Ontario); *R v Roy* 125 CCC (3d) 442 (Quebec); *R v Roth*, 2002 ABQB 145 (Alberta).

<sup>9</sup> *Criminal Code* (Chile) art 365.

<sup>10</sup> *Penal Code* (Greece) art 347.

<sup>11</sup> Cf *Penal Code* (Austria) s 206; *Criminal Code* (Belgium) art 372; *Criminal Code* (Czech Republic) s 242; *Criminal Code* (Denmark) s 222(1); *Criminal Code* (Finland) s 6(1); *Criminal Code* (France) s 225-25; *Criminal Code* (Germany) s 176; *Penal Code* (Iceland) s 202; *Criminal Law (Sexual Offences) Act 2006* (Ireland) s 2(1); *Penal Code* (Italy) s 609; *Penal Code* (Israel) art 347; *Penal Code* (Japan) art 176; *Penal Code* (South Korea) art 305; *Penal Code* (Luxembourg) art 372; *Criminal Code* (Netherlands) art 245; *Crimes Act 1961* (NZ) s 134; *General Civil Code* (Norway) s 196; *Criminal Code* (Poland) s 200; *Penal Code* (Portugal) art 172; *Criminal Code* (Slovakia) s 201; *Penal Code* (Slovenia) s 183; *Penal Code* (Spain) art 181(2); *Criminal Code* (Sweden) Ch 6, s 4; *Federal Criminal Code* (Switzerland) art 187(1); *Criminal Code* (Turkey) art 104; *Sexual Offences Act 2003* (UK) s 9. In the United States laws which provided for an unequal age of consent were ruled unconstitutional in *Lawrence v. Texas* (2003) 539 US 558.

<sup>12</sup> Interview with Sergeant Fiona Peterson, Sergeant in Charge, Brisbane Police Prosecutions (telephone, 5 October 2010).

<sup>13</sup> Interview with Jonathan Ward, lawyer specialising in juvenile offending, South West Brisbane Community Legal Centre (11 October 2010).

<sup>14</sup> The Hon. Michael Kirby AC CMG, ‘Unequal Laws Affecting Homosexual Citizens in Queensland’ (Media Release, 2 February 2010) 1.



## 2. Human rights violations

The LGBTI Legal Service considers that the retention of “unlawful sodomy” must be reviewed because it violates young homosexual males’ human rights to non-discrimination and privacy.<sup>15</sup>

### 2.1 Right to non-discrimination

“Unlawful sodomy” is discriminatory because it renders males aged under 18 liable to unfavourable treatment (e.g. imprisonment) on the basis of their sexuality. It is not directly discriminatory<sup>16</sup> because, on its face, it applies equally to everyone, regardless of sex or sexual orientation, aged below 18. It is, however, indirectly discriminatory because, in practice, it disadvantages young homosexual males more severely than others.

In *Sutherland v United Kingdom*<sup>17</sup> the European Court of Human Rights (ECHR) declared that the English offence of “buggery,”<sup>18</sup> which prescribed for homosexual males a higher age of consent than heterosexual males, violated homosexual males’ rights to non-discrimination (enshrined by the European Convention on Human Rights<sup>19</sup>). By preventing young homosexual males from engaging in sexual intercourse until age 18, the Queensland offence of “unlawful sodomy” effectively achieves the same result and so violates young homosexual males’ right to non-discrimination.

The discriminatory impact of the law has also been noted within Queensland. In 2005, then Anti-Discrimination Commissioner (Qld) Susan Booth informed the then Attorney-General Rod Welford MP that, “[t]he provisions of the *Criminal Code* which impose different minimum ages at which persons can lawfully participate in sexual intercourse are inconsistent with the objects of the *Anti-Discrimination Act 1991*.”<sup>20</sup> Also, in 1991, the Parliamentary Criminal Justice Committee recommended that, “[t]he age of consent for homosexual acts, in accordance with the principles of sexual equality and anti-discrimination, be the same for males as it is for females, irrespective of whether the sexual act is heterosexual or homosexual.”<sup>21</sup>

<sup>15</sup> It is noted that provisions in international human rights treaties are not binding in Australia, even if the Commonwealth Government ratifies them: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>16</sup> For definition of ‘direct discrimination’ see, *Anti-Discrimination Act 1991* (Qld) s 10.

<sup>17</sup> (1997) 24 EHRR CD22.

<sup>18</sup> *Sexual Offences Act 1956* (UK) s 12(1). (Now amended so as to be non-discriminatory)

<sup>19</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 14. See also equivalent provision in International Convention on Civil and Political Rights (which Australia has ratified): *International Covenant on Civil and Political Rights*, opened for signature 19 November 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

<sup>20</sup> Letter from Susan Booth to the Hon Attorney-General Rod Welford MP, 15 July 2005, 1 <[http://www.queerradio.org/AOC150705\\_ADCQ\\_1of2.jpg](http://www.queerradio.org/AOC150705_ADCQ_1of2.jpg)>.

<sup>21</sup> Parliamentary Criminal Justice Committee, Parliament of Queensland, *Report into the Report of the Criminal Justice Commission entitled ‘Reforms in Laws Relating to Homosexuality – An Information Paper’* (1990) 49, Recommendation 7.



## 2.2 Right to privacy

In *Toonen v Australia*<sup>22</sup> the United Nations Human Rights Committee (UNHRC) declared that Tasmanian laws, which prohibited male homosexual intercourse, unreasonably interfered with the male homosexuals' rights to privacy (enshrined by the International Convention for Civil and Political Rights<sup>23</sup>). By exposing young homosexual males to prosecution for voluntary intercourse conducted in private, the offence of "unlawful sodomy" similarly violates homosexual males' right to privacy.

## 3. Endangerment of young homosexual males

The LGBTI Legal Service also considers that the offence of "unlawful sodomy" endangers young homosexual males in a physical, emotional and legal sense.

### 3.1 Physical endangerment

The recent increase in HIV infection among Queenslanders emphasises the need to disseminate safe-sex education.<sup>24</sup> However this activity is inhibited by the retention of "unlawful sodomy."

"Unlawful sodomy" physically endangers young people because it inhibits the delivery of homosexual safe-sex education which increases their likelihood of contracting sexually transmitted diseases.<sup>25</sup> A primary cause is confusion about teachers' and professionals' capacity to provide young people with information and support regarding illegal anal intercourse.<sup>26</sup>

"Unlawful sodomy" also creates confusion about teachers' and professionals' obligations to notify authorities about young people engaging in illegal anal intercourse.<sup>27</sup> Because of this, young sexually-active males may be reluctant to seek support, guidance or education from teachers or professionals and thus continue to expose themselves and others to HIV and other infection.<sup>28</sup> This has

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<sup>22</sup> Human Rights Committee, *Jurisprudence: Communication No 488/1992*, 50<sup>th</sup> sess, CCPR/C/50/D/488/1992 (4 April 1994).

<sup>23</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 November 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.1.

<sup>24</sup> Queensland Association for Healthy Communities, 'Improving the Lives of LGBT Queenslanders: A Call to Action' (Information Booklet, April 2010) 6–7. See also, Department of Health and Ageing (Cth), 'National HIV/AIDS Strategy: Revitalising Australia's Response 2005–2008' (Policy Document, 2005) 11–16 <[http://www.health.gov.au/internet/main/publishing.nsf/content/3F25543027A178E9CA25710F0017AD3A/\\$File/hivaidst\\_strategy.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/3F25543027A178E9CA25710F0017AD3A/$File/hivaidst_strategy.pdf)>; Queensland Association for Healthy Communities, 'Queensland AIDS Council Responds to HIV Increase' (Press Release, 5 May 2005), 1–2.

<sup>25</sup> Australian Federation of AIDS Organisations, 'Age of Consent Laws' (Briefing Paper for AFAO members, October 2006) 3.

<sup>26</sup> Interview with Paul Martin, General Manager Queensland Association for Healthy Communities (telephone interview, 5 October 2010).

<sup>27</sup> Note that it is policy of the Department of Education Queensland that teachers report persons under 18 whom they believe have engaged in sodomy to the principal of their school. The principal, with the consent of the children involved, may then contact parents and, possibly, police: Department of Education Queensland, *SMS-PR-012: Student Protection* (23 September 2010) <<http://education.qld.gov.au/strategic/eppr/students/smspr012/>>. See also, Loretta De Plevitz, 'Take-home lessons for gay, lesbian, transgender and bisexual school students' (2005) 30(4) ALJ 180–183.

<sup>28</sup> Interview with Sally Morris, coordinator Open Doors LGBT Youth Service (Brisbane, 16 September 2010); Interview with Paul Martin, General Manager Queensland Association for Healthy Communities (telephone interview, 5 October 2010).





repercussions for the wider community - females are exposed to infection by HIV-positive males who are bisexual.

### 3.2 Emotional endangerment

“Unlawful sodomy” endangers young homosexual males’ emotional well-being. By threat of criminal prosecution, “unlawful sodomy” discourages young homosexual males from sexually expressing, and openly exposing, their sexuality. Such discouragement can lead young homosexual males to believe that their sexuality and identity is illegal and immoral. This is exacerbated by the Queensland classification of the offence, which is contained in Chapter 22 of the *Code*, “Offences Against Morality”. Further, the differential legal prohibition of anal intercourse can indirectly validate homophobia.<sup>29</sup>

These factors can contribute to depression and suicide. A plethora of research<sup>30</sup> already confirms that young homosexual/bisexual persons experience mental illness and suicide at far higher rates than their heterosexual peers do. The retention of a law like “unlawful sodomy,” which can exacerbate mental illness and suicide amongst gay youth, is irresponsible.

### 3.3 Legal endangerment

Young homosexual males are legally endangered in two ways. First, because the offence of “unlawful sodomy” is not effectively publicised, they are in danger of committing anal intercourse without realising that they are incriminating themselves. Second, because of less than fulsome dissemination of safe-sex education, young homosexual males are in danger of transmitting HIV which, in Queensland, is an offence punishable by life imprisonment.<sup>31</sup> These legal dangers are exacerbated by the fact that, in Queensland, 17-year-olds are tried as adults.<sup>32</sup>

## 4. Recommendations

The LGBTI Legal Service is of the view that inaction on this issue will contribute to continuing discrimination; continuing validation of homophobia in the community; continuing risk that the right to

<sup>29</sup> This is concerning given that 3 in 5 homosexual Queenslanders claim to have been the subject of homophobic abuse: Queensland Association for Healthy Communities, ‘Improving the Lives of LGBT Queenslanders: A Call to Action’ (Information Booklet, April 2010) 2. See especially, Alan Berman, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland* (Australian Academic Press, 2010).

<sup>30</sup> Australian Bureau of Statistics, *National Survey of Mental Health and Wellbeing 2007: Summary of Results* (Research Statistics, 23 October 2008) 32; Julianne Corboz et al, ‘Feeling Queer and Blue – A Review on the Literature on Depression and Related Issues among Gay, Lesbian, Bisexual and Other Homosexually Active People’ (Literature Review, Beyond Blue, December 2008); Lynne Hillier, Alina Turner, Anne Mitchell, ‘Writing Themselves in Again – 6 Years On: The 2<sup>nd</sup> National Report on the Sexual Health and Well-Being of Same Sex Attracted Youth in Australia’ (Research Report, Australian Research Centre in Sex, Health and Society (ARCSHS), La Trobe University, 2005) 22, 43–54. See also, Christopher Kendall and Sonia Walker, ‘Teen Suicide, Sexuality and Silence’ (1998) 23 *Alternative Law Journal* 216.

<sup>31</sup> *Criminal Code 1899* (Qld) s 317.

<sup>32</sup> See, *Youth Justice Act 1992* (Qld) s 6.



privacy will be breached; continuing feelings of alienation, leading to suicide ideation and suicide among gay teens; continuing inhibition of safe sex education; and continuing high rates of transmission of HIV and other infections.

Four recommendations are outlined below which seek to address these issues through alteration of the *Criminal Code 1899* (Qld).

**Recommendation 1: Repeal the offence of ‘unlawful sodomy’**

Sections 208 and 578(1A) (alternative verdicts for section 208) of the *Criminal Code 1899* (Qld):

repeal

Section 215(6) of the *Criminal Code 1899* (Qld):

repeal

Section 216(5) of the *Criminal Code 1899* (Qld):

omit “*carnal knowledge* does not include sodomy”

Ideally, homosexuality and heterosexuality should be treated by the law identically. Accordingly, sex with a child should be criminalised simpliciter, not because it involves specifically heterosexual or specifically homosexual sex with a child.

It should be noted that the definition of “carnal knowledge” in the *Criminal Code* expressly includes “sodomy.”<sup>33</sup> It is only for the purposes of section 215 (children under 16) and section 216 (persons with an impairment of the mind), that “carnal knowledge” carries a narrower meaning excluding anal intercourse.<sup>34</sup> Carnal knowledge in each of those sections could very easily be made to carry the same meaning that it does in the rest of the *Criminal Code*.

Ideally, this recommendation should preferentially be taken up with recommendation 3 outlined below, effectively removing both the differential treatment and reference to the term ‘sodomy’, which carries negative connotations. Adopting this approach would give the greatest equality possible, and greatly ameliorate the concerns outlined above.

<sup>33</sup> *Criminal Code 1899* (Qld) s 6(2) (added in 2004: *Justice and Other Legislation Amendment Act 2004* (No. 43)(Qld) s 3, Sch).

<sup>34</sup> *Criminal Code 1899* (Qld) ss 215(6) and 216(5) (added in 1997: *Criminal Law Amendment Act 1997* (No. 3) (Qld) s 26(4)).



### **Alternative recommendations**

#### **Recommendation 2: Retain the offence of ‘unlawful sodomy’ but decrease the age of consent**

Section 208(1)(a), (1)(b) and (3) of the *Criminal Code 1899* (Qld):

replace “18” with “16”

Alternatively, the age of consent in section 208 of the *Criminal Code* could be lowered to the age of 16, in line with the law applicable to young heterosexual men. While in effect this would remove discrimination and uphold the right to privacy, the retention of a separate offence predominantly affecting homosexuality would needlessly perpetuate lingering anti-homosexual sentiment in the community that in some relevant sense homosexuality should be treated differently.

However, if the age of consent were equalised, the only motive for retaining the offence of “unlawful sodomy” would be in fidelity to the historical criminalisation of homosexuality. As such, this recommendation, if taken up, should preferentially be adopted along with recommendation 3 below.

#### **Recommendation 3: Remove all mention of ‘sodomy’ and replace, if appropriate, with ‘anal intercourse’**

Sections 6(2), 208, 215(6) and 216(5) of the *Criminal Code 1899* (Qld):

replace “sodomy” with “anal intercourse”

The word “sodomy” has strong overtones of moral condemnation. It derives from the Ecclesiastical Latin, *peccatum Sodomiticum* meaning “sin of Sodom,”<sup>35</sup> in reference to a religious belief that God destroyed the city of Sodom for acts of homosexuality.<sup>36</sup> No other Australian State or Territory persists in using the word “sodomy” in its relevant criminal legislation.<sup>37</sup> The South Australian legislation mentions “sodomy” only to stipulate that it is abolished as an offence under statute and at common law.<sup>38</sup>

To reduce this stigma, references to “sodomy” could be replaced with amoral technical language such as “anal intercourse.” For that matter, “knowledge” as a sexual connotation has Biblical overtones, such that replacement of “carnal knowledge” with “sexual intercourse” may be timely, though the LGBTI Legal Service is not directly concerned with this terminology.

Whilst this gives effective equality, the retention of separate offences maintains a division between heterosexual and homosexual activities. As discussed earlier, this has the effect of indirectly validating homophobia.

<sup>35</sup> *The Australian Concise Oxford Dictionary* (1990, Oxford University Press, Melbourne) 1070.

<sup>36</sup> Genesis 18-20.

<sup>37</sup> *Crimes Act 1900* (ACT); *Crimes Act 1900* (NSW); *Criminal Code 1983* (NT); *Criminal Code 1924* (Tas); *Crimes Act 1958* (Vic); *Criminal Code Act 1913* (WA).

<sup>38</sup> *Criminal Law Consolidation Act 1935* (SA) s 68 A.





***Recommendation 4: Increase the age of consent for all other forms of sexual intercourse***

Section 215(1) and (5) of the *Criminal Code 1899* (Qld):

replace “16” with “18”

The age of consent in section 215 of the *Criminal Code* could be increased to the age of 18, so that young heterosexual people are subjected to the same treatment that young homosexual men currently face. While this option would eliminate discrimination, such an amendment would likely exacerbate the issues discussed herein, including violation to the right of privacy, and inhibition of the effective dissemination of safe sex education to all young people.

