

NSW Council of Churches

Submission to the Inquiry into an Equal Age of Consent

NSW Legislative Council's Standing Committee on Social Issues

Terms of reference - to inquire into and report on:

1. *The social and legal impact of the lowering of the age of consent for homosexual males to the same age which applies to heterosexual males and females and lesbians, and in particular, the lowering of the age of consent as proposed in the Crimes Amendment (Sexual Offences) Bill 2002 introduced into the Legislative Council on 29 August 2002, and*
2. *Any related matter.*

Preamble

In previous years, for reasons considered by this Council to be good ones, the NSW Parliament has rejected attempts to amend this Act in order to have an equal age of consent for males and females in regard to sex offences.

We recognize but do not condone the strong ideological push for treating males and females equally in these respects and in particular to draw no distinction between male/male homosexual acts on the one hand and heterosexual and lesbian relationships on the other, but we nevertheless maintain the argument that the social and legal impact of the proposed Bill would be detrimental to our society and damaging to the young people whose protection is our great responsibility.

A. This Council, for reasons set out below, is prepared to endorse an equal age of consent for males and females only if the age for both is 18, not 16. Otherwise we would prefer that the proposed legislation be rejected by Parliament.

B. We also note some serious drafting errors and legal anomalies in the proposed bill.

Part A.

1. In section 77, (**Consent no defence in certain cases**) we note that a defence to charges is available in 2(a) to 2 (c). The clause "If the person charged and the child to whom the charge relates are not both male" is being deleted before "it is made to appear to the court or to the jury before whom the charge is brought that:
 - (a) the child to whom the charge relates was of or above the age of 14 years at the time the offence was alleged to have been committed,
 - (b) the child to whom the charge relates consented to the commission of the offence, and
 - (c) the person so charged had, at the time the offence is alleged to have been committed, reasonable cause to believe and in fact did believe, that the child to whom the charge relates was of or above the age of 16 years."

Part (c) is the most relevant. We would argue that by reducing the age for males to 16 years you are effectively exposing more young people to being abused because the maturity of a 16-year-old male is far more likely to be variable than one aged 18. That is, males mature later overall and therefore while it is possible or "reasonable" to mistake a 14 year old boy for a 16 year old it is not reasonable or likely to mistake a 14 year old for an 18 year old. It is a well-known fact that female sexual maturity occurs earlier and this has been part of the argument in the past for having the younger age of 16 for females, as it can be "reasonable" to mistake a 14 year old female for an 18 year old female.

The proposed lowering of the age of consent for male/male homosexual intercourse coupled with these defence clauses therefore looks like a charter for this form of pedophilia to become legal at the stroke of a pen, greatly expanding the scope for older men to seduce and prey upon sexually immature boys in their early and mid-teens. The legal as well as the social effects of these amendments to the Crimes Act will be to give less protection to young people. In their teens young people of both sexes are often confused and ambivalent about their sexuality. If their first sexual encounter is one of exploitation by an older person of the same sex they may be unhelpfully fixated at an immature developmental stage.

2. We represent Christian churches with a great concern for the integrity of marriage in our society – that it should in every way be supported and strengthened for the good of the community and families, especially children. In our opinion the social effects of lowering the age of consent for homosexual males will be to add to the increasing trend to undermine marriage both as an institution and a relationship. The biblical Christian view is that sexual relationships belong only between a male and a female, within marriage. This is consistent with the Marriage Act 1961 (Cwth), which provides in Section 11 that the marriageable age is 18 years. Marriage is only permitted in the case of a person under the age of 16 years in exceptional circumstances (Section 12). Accordingly we recommend that where the age is increased for males and females to 18 years that there be a defence available to an offence where one or more of the participants in the intercourse is married to the other party.
3. There is at present in our society a widespread, healthy horror at all forms of child abuse. In fact, with incest, this appears to represent virtually the last taboo. It therefore seems a strange anomaly that the NSW Legislative Assembly has passed this Bill, which in effect widens the scope for the sexual abuse with impunity of young males. It is just as well that the Legislative Council has referred this Bill to the Standing Committee on Social Issues, thereby allowing community input such as ours, and second thoughts about the Bill.
4. We are equally concerned for girls. That is why we are proposing the raising of the age of consent for both sexes to 18.

Part B.

If Parliament is to proceed with the proposed reform, then we submit that the present proposals are deficient in the following respects:

1. **Section 73, headed Carnal knowledge by teacher etc. and Section 74 Attempts** are evidently intended to protect school age children, although they also apply to abuse within families. **It would be a good reform for them to apply to both males and females, hetero- and homosexual/lesbian**, although difficulties remain. Given that children can be still at school at 18, **we recommend that the age in this provision should be increased to 18 even if it is not increased elsewhere .**
2. **A two or three year age differential defence could be permitted for youths over sixteen.** That is, a young person could have intercourse with a person who was 18 but not 22. This is arbitrary but is intended to prevent exploitation of younger and therefore probably more vulnerable persons by those who are in a more powerful position by reason of being older, as well as those like teachers etc. in a position of authority. This would provide a defence to the criticism often made of retaining the age 18 years that statistics seem to support a picture of very sexually active teenagers who would all be breaching the Crimes Act and subject to significant penalties. The other defence is that Courts are allowed to take into account mitigating circumstances and would probably give a suspended sentence or good behaviour bond where they were dealing with sixteen and fifteen year olds.
3. If s.73 proceeds in its amended form the words “father” and “step-father” should be replaced with “parent” and “step-parent” or “a person with which a parent is living in a

de facto relationship". The term de facto relationship should be given the broad definition it is given in the Property Relationships Act. As the law presently stands a "step-father" does not include the male partner in a de facto relationship with the complainant's mother – R v Miler [2001] NSWCCA 209.

4. We suggest the definition in s.73 (2) be amended to change the reference to a "male" to a "person". The other definition of carnal knowledge is in section 62 and refers to the "anus of a female". If not changed then it could be argued that the Legislature has effectively amended the definition of carnal knowledge to exclude "the penetration of the anus of a female". Common sense should prevent this from occurring as both definitions are not intended to be exclusive. However, the Legislature should seek where possible the consistent use of definitions in this section to avoid confusion.
5. Also we note that in section 78H – the effect of this amendment would be to reduce the sentence from 25 years to 20 years. Yet in the present climate regarding child abuse, the community would want to see both increased to 25 years. In s.78I, the amendment has the same effect as the amendment to s.78H.
6. The amendment to 78J shows serious errors of drafting, because two of the provisions referred to in that section, sections 78K and 78L, are being deleted. That is, there would be no offence under section 78K to find the person guilty of. It may be necessary to include a provision to this effect to provide some transitional effect but if that were the case then the other section – 78K and 78L would need to be retained.
7. Section 78Q – the comparable provision is section 61N. This differs only in that the penalty for the gender neutral version of 78Q is 18 months instead of 2 years.
8. Section 91D – our comment would be the same as paragraph **A.1.** above.
9. Please note the existing sections which have the c.f. reference are incorrect in the Crimes Act as the Act has been extensively amended since the original provisions containing the c.f. provisions were included. We understand that the Parliamentary Counsel have ceased using c.f. references in the titles of section in Acts as they date too quickly.