Who benefits from the equalising of age of consent provisions?

A critical analysis of the Wood Royal Commission Paedophile Inquiry recommendation for a lower minimum age of consent

Judith Lancaster

When the Wood Royal Commission into the New South Wales Police Service released its final Report on the Paedophile Inquiry in August 1997, its recommendation to remove the distinction between heterosexual and female homosexual sex and male homosexual sex by lowering the age currently set for the latter category surprised many citizens. There was concern, firstly, about the fact that the lack of satisfactory protective mechanisms in the prevailing laws would escape investigation and, secondly, that acts previously understood to be paedophilia and pederasty would be de-criminalised, thereby increasing the vulnerability of young Australians to sexual predators.

The Crimes Amendment (Sexual Offences) Bill, introduced into the New South Wales Parliament in October 1997, and reintroduced in 1999, suggests a firm determination to implement the Royal Commission recommendation on consent, notwithstanding the fact that such change would be implemented in the absence of community debate and without addressing the implications of de-criminalisation. Although the Bill was rejected in the Upper House on both occasions, it is believed that further attempts will be made in the near future and, again, it will be in the absence of broad community debate. It is also widely believed that, should a change of this nature be implemented in New South Wales, it will have implications for children in other states across Australia.

This paper explores the implications of equalising at a lower rather than higher minimum age of consent.

In recent years the rhetoric surrounding the question of what age should be considered competent to legally give consent to sexual relations has given rise to a belief that consent laws are licensing laws, rather than laws to protect the young from sexual abuse. Although the issue has received considerably more public attention in New South Wales than it has in the other Australian states, there is every reason to believe that moves to introduce legislation that will reduce the age of consent to effectively 14 years in New South Wales will flow on to other states.

The reintroduction of the Crimes Amendment (Sexual Offences) Bill in the New South Wales Legislative Council in 1999, following its rejection by that House just two years earlier, heralded a firm determination to implement changes to the State's age of consent laws. Many believe that such changes will not only fail to protect children from the harmful possibilities associated with premature sexual encounters, but will, in fact, expose an ever increasing number to the threat of sexual abuse.[1] In August 1997, the Wood Royal Commission gave priority attention to the issue by recommending that the age of consent to homosexual sex be lowered from 18 years to 16 years, thereby signalling a preference for equalising at a lower rather than higher minimum age. This was a surprising preference for a royal commission that had been set up for the purpose of inquiring into how we can

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protect children from the scourge of sexual abuse. Equally surprising was the fact that the minimum age option translated into one of the Commission's major recommendations notwithstanding the fact that the issue of lowering consent was not within the Commission's terms of reference.

The impetus for the Wood Royal Commission recommendation was a belief that equalisation represented legal reform in that it required the removal of the existing distinction between heterosexual and male homosexual sex involving children.[2] Specifically, the recommendation stated that:

> Consideration be given, with appropriate community consultation, to the introduction of legislation under which:
>
> - a gender neutral approach is taken, and in which the existing distinctions between heterosexual and male homosexual activity involving children, including the defences and maximum penalties available, is removed (para. 14.32);
> - the common age of consent is set at 16 years, subject to exceptions in relation to child prostitution and to adults standing in special relationships, in each of which cases it is set at 18 years (paras. 14.33 & 14.43);
> - the defence of mistaken but reasonable belief of consent is made equally applicable to heterosexual and male homosexual activity involving children aged 14 years or upwards (para. 14.40); and under which
> - an additional defence of consent is created applicable where the child is 14 years of age or above and the age differential with the other person involved is not more than two years, or they are married (para. 14.39).

Surprisingly, the recommendation drew very little public criticism notwithstanding the fact that it was not within the Commission's terms of reference. More recently, questions have been raised concerning some obvious anomalies. For instance, it appears from the Report that the formulation of this recommendation was strongly influenced by submissions that concentrated on discrimination against homosexual men in the application of existing legislation with no evidence that submissions addressing the legal protection of children were given similar consideration.[3] The Commission also, for reasons unknown, restricted its considerations to the question of equalising consent at a lower rather than higher minimum age without ever considering that discrimination could be removed and equalisation achieved just as effectively by equalising consent at the more protective level of 18 years as currently set for male homosexual sex.

Protection of children and adolescents from predatory exploitation is the primary function of consent legislation. The fact that these provisions are to be found under the New South Wales Crimes Act confirms that proposition. The protection is provided by law until the young are sufficiently mature physically, mentally and emotionally to understand all the implications that attach to sexual relationships and the consent they give to them. These include pregnancy and parenthood, contraception, abortion, lifestyle choices, potentially fatal sexually transmitted diseases and appreciation of the intricacies of sustaining healthy mutual relationships. In other words, the legislation is about protection from potentially harmful sexual encounters and not, as has been suggested by those who would construe the statutory consent provisions as restrictions, the licensing of the young to engage in sex in the same way as they become licensed to drive a car. Nor is it about protecting sexual predators so that they might be spared the threat of prosecution – as would be the case where there is a lower threshold for the age of consent. Yet the recommendation to equalise the age of consent at the lower rather than higher minimum age would serve only to improve protection for those who, under our current laws, would fall within the category of pederasts.[4] Few would argue with the fact that this would produce a very undesirable outcome.

Presently in New South Wales the legal age of consent for sexual relations is 16 years,[5] except in the case of male homosexual sex for which the age of consent is 18 years.[6] In other words, heterosexuals and female homosexuals are legally protected up to the age of 16 years while for male homosexuals, the period of protection extends to 18 years. Importantly, however, under the present legislation offenders charged with having sex – other than male homosexual sex – with a child between 14 and 16 years can rely on a plea of reasonable belief that the child in question was, in fact, 16 years.[7] Because of the probability that offenders would invoke this defence and the near impossibility of disproving it once it is raised, the age of consent for all but male homosexual sex is effectively 14 years. In other words, greater value is placed on the protection of male homosexuals, as compared with heterosexuals and female homosexuals, by the application of the existing legislation.

The considerations made by the Wood Royal Commission in formulating this recommendation are equally baffling. For example, the Commission concentrated on seeking solutions for what were termed anomalies or discrimination in the application of existing legislation, emphasising that male homosexuals are disadvantaged by the disparity between the age of consent for them and that for young females. This, however, is somewhat at odds with the actual finding that the group given less protection under the existing provisions of the Crimes Act is, in fact, young females.[8] If, as the Report states, it is young females who are given less protection under the existing legislation, then, one might ask, what is the rationale behind the conclusion that it is male homosexuals who are being discriminated against? It remains unanswerable because it was made clear in the Report that the Commissioner appreciated the protective function of consent provisions – as evidenced by the title of the chapter in the Report dealing with consent[9] – but not made at all clear how this conclusion was reached. Likewise, the terms of reference expressly required the Commissioner to examine the extent to which the existing criminal law is capable of protecting the young from predatory activity.[10] The fact that the current high level of legal protection given to male homosexuals is extinguished by the lower minimum age requirement means that the Commission's recommendation would ironically serve to protect and advantage offenders by reducing the scope for conviction.

On close inspection it is clear to see that the recommendation to equalise consent at the lower minimum age (as applicable to young females under existing legislation) rather than the higher minimum age (as applicable to homosexual men under existing legislation) would operate to increase the vulnerability of adolescents on the one hand while decreasing the circumstances for which pederasts might be prosecuted on the other. It would seem that, in reaching the conclusion that homosexual men were the ones being discriminated against by the application of existing legislation, the Commission may have mistakenly perceived the criminal provisions governing the age of consent to be licensing laws rather than the protective laws that they are.[11] A lower minimum age for male homosexual sex effectively places those currently afforded the benefit of greater value being placed on their protection by the operation of existing legislation, on an equal footing with the group identified by the Royal Commission as having less value placed on their protection.

The implication of the Commission's recommendation for a lower minimum age of consent, or what is more accurately described as de-criminalisation, is that, if adopted, it would expose all adolescents to the same threats to which all young persons except male homosexuals have been exposed for far too long. This suggests the Commission's understanding of child protection is considerably at odds with Article 34 of the United Nations Convention (the Convention) on the Rights of the Child to which Australia is a party and to which the Royal Commission referred as a guide to establishing an appropriate minimum age of consent. According to the Convention, a child is defined as anyone below the age of 18 and Article 34 states that:

> States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
>
> a) the inducement or coercion of a child to engage in any unlawful sexual activity;
>
> b) the exploitative use of children in prostitution or other unlawful sexual practices;
>
> c) the exploitative use of children in pornographic performances and materials.[12]

Despite making particular reference to the Convention's classification of a child as anyone under the age of 18, the fact that the Wood Royal Commission recommended that the age of consent be set below the Convention's threshold of adulthood with no real consideration of the implications of further reducing legal protection, is unfathomable. Equally unfathomable is the fact that in recommending equalisation at the lower rather than higher minimum age, the Royal Commission was arguably stepping beyond its terms of reference which required it to formulate its recommendations within the context of seeking improved protection for the young from sexual predators.

In view of the fact that, firstly, there is nothing in the Report to suggest that existing laws prohibiting crimes involving paedophilia and pederasty are operating to deter, prosecute and punish offenders so effectively as to safely warrant de-criminalisation and, secondly, the Commission's record of information collected in the course of the Paedophile Inquiry strongly suggests otherwise, there are sound reasons for believing that the prevailing laws are failing the most vulnerable members of society and therefore require stronger rather than weaker protective mechanisms. The very fact that the Commission acknowledged that

The Wood Royal Commission Paedophile Inquiry

The Wood Royal Commission Paedophile Inquiry was initially established in May 1994 as part of the Royal Commission into the New South Wales Police Service. Prior to its establishment, the Independent Commission Against Corruption (ICAC) was the body authorised to conduct investigations into paedophile activities and the conduct of public officials relating to the protection of paedophiles.

In response to a motion moved by Mrs Deidre Grusovin MLA in the Legislative Assembly on 2 December 1994 the ICAC's terms of reference were transferred to the Wood Royal Commission. Further motions were moved on 2 December1994 to extend the Royal Commission's terms of reference to include investigation into pederast as well as paedophile activity in the State of New South Wales. Public hearings in relation to the paedophile inquiry commenced on 18 March 1996 amid concern that the terms of reference were too narrowly defined to allow the Royal Commission to properly carry out its investigations.

This prompted the Honourable Franca Arena MLC to seek a resolution for enlargement of the terms of reference and an extension of the duration of the Royal Commission. The Letters Patent were extended to provide for the Royal Commission to inquire fully into the adequacy of the existing laws and the investigatory and trial processes to deal with crimes involving paedophilia and pederasty, and into the sufficiency of the monitoring and screening processes of government departments and agencies to protect children in their care.

Notwithstanding these extended powers, the Royal Commission remained severely restricted in that it was not authorised to undertake purely criminal investigations and its investigations into paedophile and pederast activities extended only to activities that could be linked to police corruption.

there are paedophile networks operating suggests that some and perhaps many offenders are avoiding detection, prosecution and punishment. Whether these networks are of the *high level*[13] kind or *...of the loose-knit, covert and non-commercial kind...*, as described by the Commissioner in the Report, is irrelevant. What is important is to look beyond the rhetoric and realise that, while paedophile networks flourish for the purpose described in the Report as *...for ... sharing experiences, and in some cases sharing children*,[14] then the legislation needs to be more not less protective of children.

The question that arises is how did the Royal Commission manage to reach the conclusion that the interests of adolescents would be best served by recommending the setting of a lower minimum age of consent. Two possibilities spring to mind, both of which suggest reliance on too narrow a range of information sources. Firstly, the Commission sought the views of confessed paedophiles about the appropriate age at which to set consent[15] and, secondly, the sources of the submissions that the Commission relied upon to delineate its considerations on this issue may have been so limited as to result in a disproportionate representation of views. As far as the former is concerned, the Commission justified its choice of source on the basis that it needed to understand the characteristics of offenders in order to properly explore the area of extrafamilial sexual abuse.[16] While this offers some explanation for the Commission providing confessed paedophiles with a platform for expressing their views on the age of consent, it provides no justification for recommending legislative changes favoured by them rather than those who assume responsibility for the safety and well-being of the young such as parents. Similarly, the lower minimum age recommendation satisfies the demands expressed by only a selected group across those that could be described as interested parties. There is nothing in the Report to indicate the extent to which the Commission's considerations may have been influenced by what is best described as widespread lobbying from the International Lesbian and Gay Association (ILGA). The possibility that the Royal Commission could have been influenced by as many as 320 member organizations in 80 countries and more than 500 organizations and individuals from 85 countries on the action list of ILGA is strong, given that the political demands expressed through networks of these proportions are likely to be heard as well as the fact that the lower minimum age recommendation satisfies the demands of both this group and that set up to monitor the Royal Commission known as *Commission Watch*.[17]

Another possible cause could relate to the impoverished state of community debate in New South Wales. The only debate that has taken place so far concerning the legal age of consent seems to be based on an inaccurate interpretation of consent laws as licensing laws. What has been missing from this debate is discussion about the protective function of consent laws. As a result, different perspectives are not heard and, therefore, not understood. Defining the issue as one of discrimination and confining the solutions to equalisation at a lower minimum age obscures the fact that this form of change de-criminalises acts currently classified as pederasty and exposes all adolescents to the same threats to which all young persons except male homosexuals have been exposed already.

The dominance of the practice of privileging the civil liberties of perpetrators over the rights of victims makes it highly inappropriate to change laws that would be welcomed by perpetrators and deplored by victims. One does not have to look very far to realise just how inappropriate such changes would be. For example, a 1999 newspaper article carrying the headline 'Guilty arts lover freed' revealed that a prominent member of Sydney's arts community on trial for what was reported as *...committing an act of indecency upon a teenage boy (aged 13), walked from court without a conviction... despite being found guilty by a jury*. Two matters arising from this report are of particular concern. Firstly, there is the sitting judge's reference to the offender as '*... well-connected and financially comfortable*' and '*... involved in the arts community for many years*', and, secondly, her reason for releasing him after the jury found him guilty was that it would be '*... unduly harsh to issue a penalty which jeopardised his career*'.[18] In the absence of opportunity for obtaining further information concerning the details of this case,[19] the public has no choice but to be left unaware of the reasons for what can only be described as a controversial outcome.

It is hoped that future attempts to legalise a lower minimum age of consent will be considered only after fully inclusive debate has taken place. Fully inclusive debate requires that the views of all interested parties are invited and heard. What has been ignored in the past is the fact that a large proportion of those who oppose a lower minimum age also object to the current laws, but for different reasons from those whose opposition is based on a perception that the current laws discriminate against homosexual men. Their objection, however, is based on a belief that they are flawed because appropriate protection is provided only to male homosexuals in that they are the only ones given full legal protection from predatory activity up until the age of 18 years.[20] What these critics are in fact arguing is that the real victims of discrimination are heterosexuals and female homosexuals who are exposed to exploitation at a far more vulnerable age. They also consider the legislation flawed for ignoring the fact that a distinction needs to be made between predatory sexual activity on the one hand and experimental teenage sex on the other. They believe that this distinction should be by way of a similar age exemption that would operate to exclude teenagers who are close in age from being subject to legislative provisions aimed at criminalising sexual predators rather than limiting the space in which they can consensually and safely explore their sexuality.

Given the fact that the recommendation for a lower minimum age carries with it the authority of being formulated by an authoritative body with the status that surrounds the Wood Royal Commission, its substance has been assumed and therefore unquestioned. But the biased nature of the debate so far, along with recent attempts to implement the Commission's recommendation through legislation,

has aroused significant concern amongst parents and others who bear responsibility for the care and well being of children. If approved and enacted, amendments such as those proposed in the Crimes Amendment (Sexual Offences) Bill 1997 would serve to increase the vulnerability of the young to sexual exploitation. This is because they seek, amongst other things, to equalise both the age of consent and the application of an honest and reasonable belief defence. Accordingly, consent would be set at the lower (16 years) rather than higher minimum age (18 years), but by virtue of the inclusion of honest belief defence, the common age of consent will effectively be 14.

The Wood Royal Commission recommended reform but made it clear that such reform should be implemented only after appropriate community consultation had taken place.[21] I am unaware of any community consultation taking place prior to the introduction of the Crimes Amendment (Sexual Offences) Bill 1997 or at any time since. Clearly, no child or adolescent, whether male or female, homosexual or heterosexual, would benefit from any proposal to equalising of the age of consent provisions. The only group who would stand to gain, should this recommendation be implemented, would be those classified as pederasts under existing legislation. An outcome as incongruous as this renders this recommendation well beyond the terms of reference of the Wood Royal Commission Paedophile Inquiry. □

Information on child sex offences in each State/Territory is included in the following Acts:

ACT:	*Crimes Act 1900*
NT:	*Criminal Code Act 1983*
NSW:	*Crimes Act 1900*
QLD:	*Criminal Code 1899*
SA:	*Criminal Law Consolidation Act 1935*
TAS:	*Criminal Code Act 1924*
VIC:	*Crimes Act 1958*
WA:	*Criminal Code Act 1913*

NOTES

[1] The Crimes Amendment (Sexual Offences) Bill was introduced into the New South Wales Parliament (in October 1997) as a private member's bill by Labor MLC Jan Burnswoods and reintroduced in October 1999. The Bill was defeated when the Upper House Members voted to cease debating it on 10 November 1999.

[2] Royal Commission into the New South Wales Police Service, Final Report Volume V: The Paedophile Inquiry (henceforth RCPI), August 1997, p1087 and p1325.

[3] These submissions addressed what was described in the Report as 'the difference between the ways in which the law treats consensual heterosexual and male homosexual intercourse with children aged 16 years or 17 years'. See RCPI Vol V, para 14.5.

[4] Should the RCPI recommendation be adopted, a proportion of persons, who under the current provisions would be committing an offence, will escape prosecution. They will also gain improved access to a larger group of young males who will be rendered as unprotected by the law as young females have been under the current provisions.

[5] Crimes Act (NSW) 1900, s.61J

[6] Crimes Act (NSW) 1900, s.78K

[7] Crimes Act (NSW) 1900, s.77(2)

[8] The summary findings on the adequacy of protection laws were expressed as follows:
In the result, on their face the various provisions of the Crimes Act:
- place less value on the protection of young females compared with young males;
- operate in a way that is discriminatory against male homosexuals;
- are inconsistent as to the availability of a defence;
- are unnecessarily complex, particularly in relation to areas of overlap, consent and circumstances of aggravation; and
- result in significant, and at times inexplicable, differences in maximum penalty for similar conduct.
RCPI Report, Vol V, para 14.10

[9] RCPI Report, Vol V, Chapter 14 is entitled 'Adequacy of Protection Laws'.

[10] The relevant directive is expressed as follows:
The amended terms of reference, relevant to the paedophile inquiry, require the Royal Commission to inquire into:
Whether the existing law prohibiting crimes involving paedophilia and pederasty are appropriate and sufficient to effectively prosecute persons accused and punish persons convicted of those crimes or other related crimes of sexual abuse. RCPI, Vol IV, para 1.27(g).

[11] This is suggested by the Commission's identification of the issues considered relevant in reaching its conclusions concerning the age of consent. See RCPI Report, Vol V, para 14.33 which states that the Commission had regard to ...*the need for the law to recognise current social mores and practices, and the circumstance that most adolescents are today sexually active by the age of 16 years; and are very much better informed about sexual matters through education, films, magazines, television, radio and otherwise than past generations;* ...

[12] cited in the RCPI Report Vol IV, para 1.43

[13] High level networks were described as akin to *a single covert and organised network of individuals, comprising highly placed offenders, who communicate with each other in order to procure children for sexual purposes, and who have the capacity to use their office of influence to protect one another.* See RCPI Report Vol IV, para 3.76 and 3.77

[14] RCPI Report Vol IV, para 3.82

[15] See *Sydney Morning Herald*, 27 August 1996, p3

[16] RCPI Report Vol IV, para 1.64

[17] Information gained from Gay Law Net referring to article in Melbourne Star Observer No.340, 15 November 1996, p4. The article reveals that a Sydney group - Commission Watch - set up to monitor the NSW Wood Royal Commission's enquiries into paedophilia and police corruption called on the International Lesbian and Gay Association (ILGA) for help in what was described as 'urging reform' of the State's age of consent laws.

[18] *Sydney Daily Telegraph*, 17 April 1999

[19] The loss of opportunity relates to the fact that an order suppressing publication was issued by Judge Ainslie-Wallace who heard the matter. See *Daily Telegraph*, 17 April 1999.

[20] Current legislation provides that 'consent' is no defence to any charge involving a male child under 18 years of age - Crimes Act (NSW) 1900 s.77.

[21] RCPI Report Vol V, Recommendations p1087.

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