

Briefing Paper for AFAO members

June 2006

Age of Consent Laws

The age of consent for homosexual and heterosexual sex is 16 years of age in the ACT, NSW, NT, Victoria and WA, and 17 years of age in South Australia and Tasmania. Of all the Australian states and territories, only Queensland retains a discriminatory age of consent for homosexual and heterosexual sex.

The table below sets out the relevant laws and also defences to the specific criminal charges. Generally, there are two types of defences available. The first relates to the two people concerned being close in age (e.g. a 17 year old and a 15 year old). The second relates to the accused having made a reasonable mistake in believing the person with whom they were having sex was over the age of consent. The defences are applied differently in each state and territory.



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ACT	The age of consent for gay (and heterosexual) sex is 16. Legally, it is a defence if: <ul style="list-style-type: none">• you believed your partner was 16 or older, or• your partner was above the age of 10 and consented, and you were not more than 2 years older than them (e.g. Consensual sex between a 15 year old and a 14 year old).
NSW	The age of consent for gay (and heterosexual) sex is 16. Legally, it should be a defence if you made an honest and reasonable mistake in believing your partner was 16 or older, however, this has not been tested in court (as of January '06).
NT	The age of consent for gay (and heterosexual) sex is 16. Legally, it is a defence if your partner was 14 or older and you believed they were 16 or older.
Qld	The age of consent for anal sex is 18 (16 for vaginal sex). Legally, it is a defence if your partner was 12 years or older and you believed they were 18 or older.
SA	The age of consent for gay (and heterosexual) sex is 17. Legally, it is a defence if your partner was 16 or older and you were under 17 or believed your partner was 17 or older.
Tas	The age of consent for gay (and heterosexual) sex is 17. Legally, it is a defence if: <ul style="list-style-type: none">• you believed your partner was 17 or older.• your partner was 15 or older and you were not more than 5 years older than them.• your partner was 12 or older and you were not more than 3 years older than them.
Vic	The age of consent for gay (and heterosexual) sex is 16. Legally, it is a defence if: <ul style="list-style-type: none">• your partner was 10 or older and you believed they were 16 or older.• you were not more than 2 years older than them.
WA	The age of consent for gay (and heterosexual) sex is 16. Legally, it is a defence if you believed your partner was 16 or older and you were not more than 3 years older than them.

Queensland has a general age of consent for sexual intercourse set at 16 years of age for men and women, but a higher age of consent of 18 years of age for anal sex. This restriction applies to any person who sodomises someone under 18 years or permits a male person under 18 years to sodomise him or her (section 208 of the Queensland Criminal Code). The maximum penalty for anal sex with someone under 18 years of age is 14 years imprisonment. Although the anal intercourse law applies to both young men and women, in practice it particularly affects young gay men.

In July 2005, the Qld Anti-discrimination Commissioner, Susan Booth, wrote to the Queensland Government, arguing that the provisions of the Criminal Code are inconsistent with the objects of the Qld *Anti-Discrimination Act 1991*. Ms Booth argued that the real effect of the Code is to treat homosexual men differently to heterosexual men and women. It therefore discriminates on the basis of sexuality.¹ In subsequent correspondence with AFAO, the Queensland Attorney General, Linda Lavarch, has stated that the government has no plans to change the legislation at present.

As well as being discriminatory, the law is at odds with young people's sexual practices. Research conducted by the Australian Research Centre in Sex, Health and Society (ARCHRS) found that many same-sex attracted young people came to a very early realisation of their sexual difference, with the majority realising their sexual difference at puberty (11 – 13 years). It also showed that same sex attracted young people were likely to be sexually active earlier than their heterosexual peers (although sometimes these early encounters were with people of the opposite sex).²

Of particular relevance to HIV educators is the finding that only 70 % of the 15-18 year olds surveyed used a condom during their last penetrative sex encounter, although boys were more likely to use a condom than girls.³ Rates of diagnosed STIs were five times higher than those for heterosexual young people⁴, with 10% having been diagnosed with an STI⁵. These findings give a clear message that young people require more and better sexual health information and support in having safe and protected sex. Clearly that can't effectively occur if the consensual sexual acts in which they engage are illegal.

Discriminatory age of consent laws undermine efforts to address young gay men's sexual and general health. AFAO and its member organisations have argued that a supportive and non-punitive legal environment is essential for HIV prevention, treatment and care programs to operate effectively. Acknowledgement of the need for an enabling legal and policy environment has been one of the strengths of Australia's National HIV/AIDS Strategy.

¹ Letter from Susan Booth, Anti-Discrimination Commissioner Queensland to the Qld Attorney-General and Minister for Justice, the Honourable Rod Welford MP, 15 July 2005, quoted at http://www.queerradio.org/AOC150705_ADCQ.htm.

² Hillier L, Turner A, Mitchel A, (2005) *Writing themselves in again: 6 years on - the 2nd national report on the sexuality, health & well-being of same sex attracted young people in Australia*, (Monograph series no. 50), Australian Research Centre in Sex, Health & Society, La Trobe University, Melbourne, p. vii & viii.

³ Ibid, p.33

⁴ from Australian Research Centre in Sex Health & Society (2003), *Secondary Students & Sexual Health 2002: Results of the 3rd National Survey of Australian Secondary Students, HIV/AIDS and Sexual Health*

⁵ Hillier L, Turner A, Mitchel, op cit, p.viii