## Queensland Legislative Assembly

# REPORT

of the

# PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

Into the Report of the Criminal Justice Commission
entitled "Reforms in Laws Relating to Homosexuality
- An Information Paper"

Laid on Table of the Legislative Assembly and
Ordered to be Printed

Report No. 2, October 1990

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**(Member for Brisbane Central)**

**Honourable W A M Gunn MLA, Deputy Chairman**
**(Member for Somerset)**

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**(Member for Pine Rivers)**

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**Chairman's Foreword**

The Fitzgerald Report, at page 377 under "Recommendations" for the Criminal Justice Commission, sets out a review program which, amongst other things, provides for a general review of the criminal law "including laws relating to voluntary sexual or sex related behaviour, s.p. bookmaking, illegal gambling and illicit drugs, to determine:
(a) the extent and nature of the involvement of organised crime in these activities
(b) the type, availability and costs of law enforcement resources which would be necessary effectively to police criminal laws against such activities and
(c) The extent (if at all) to which the present criminal activity should be legalised or criminalized.

At page 361 of the report, Commissioner Fitzgerald stated:

> "Consideration must also be given to the priorities for law enforcement, and a review of the criminal law.
>
> "Laws may be futile when they fail to address the problems caused by certain conduct, or when they are inadequately enforced. Laws should reflect social need, not moral repugnance. The use of scarce police resources on enforcing laws which prohibit conduct on which the community is divided, and which does not threaten the community, is questionable. This is especially so if such enforcement diverts resources from the policing of other activity which truly threatens society and against which the community is more or less united".

At page 362 of the report the following further point is made:-

> "Prostitution, other voluntary sexual behaviour, s.p. bookmaking, illegal gambling and the illicit sale of alcohol and drugs are presently criminal offences, but the laws concerning them are not effectively enforced. From a resources point of view, there are arguments for decriminalisation and regulation of some of these types of conduct".

Prior to the December 2 1989 state election the then Opposition Leader Wayne Goss MLA, and now Premier, promised that if a Labor Government was elected it would refer the issue of homosexual law reform to the Criminal Justice Commission for consideration and report.

Earlier this year, I discussed with the Chairman of the Criminal Justice Commission, Sir Max Bingham QC, the question of whether homosexual law reform fell strictly within the Fitzgerald recommendations for the Commission's consideration.

Sir Max Bingham and I agreed that the Commission would produce an Information Paper on the question of homosexual law reform and that the Parliamentary Committee would then subsequently release that Criminal Justice Commission report publicly, seek public

submissions and make an appropriate report to Parliament.

This is that appropriate report.

In the Information Paper from the Criminal Justice Commission, Sir Max Bingham and the Commission confirms these discussions when the report says "The document takes this form by agreement between the Commission and the Chairman of the Parliamentary Criminal Justice Committee, Mr P Beattie."

On behalf of the Parliamentary Committee, I formally thank the Commission for the production of its Information Paper which has been of considerable assistance in not only preparing this report but in providing a document on which public submissions could be made.

The Criminal Justice Commission's report was released publicly on Friday 1 June 1990 and public opinion and submissions were immediately sought on that report.

This was followed on 9 June 1990 by state-wide and national advertisements placed by the Committee inviting the general public and interested groups to make written submissions on the contents of the Criminal Justice Commission's report. The closing date was 5.00 pm on Monday 9 July 1990.

Public hearings where then held on 6 and 7 August 1990. Eighteen representatives from interested organisations and individuals presented evidence to the Committee. The transcript of the hearings was tabled in the House on Tuesday 4 September, 1990.

This report, therefore, represents the considerations of the seven members of the Committee, who reflect the political balance in the House.

It also includes consideration of opinions and factual evidence from a broad spectrum of people covering not only individuals but a wide cross section of churches, professional associations, including psychologists and psychiatrists, as well as organisations and groups both opposing and supporting changes to the law and finally the Director of Prosecutions for Queensland, Mr Royce Miller QC, who was requested to appear before the Committee to provide expert evidence.

The written submissions and the public hearings helped to define the major issues relating to homosexual law reform and enabled Committee members to concentrate on and refine their opinions with respect to these particular concerns.

This report attempts to establish what the major issues are and to make appropriate recommendations.

It is stressed that this has been an enormous task for the Committee. Committee members have been required to consider well over 2,000 written submissions and 18 detailed oral submissions at the public hearings representing a wide range of views. The submissions received by the Committee (except those which requested confidentiality) are tabled in the House with this report.

I would like to thank all members of the Committee for their hard work and commitment to this report and acknowledge that all Committee members, regardless of their political persuasion have adopted a professional and sincere approach to this issue as well as the work of the Criminal Justice Committee generally.

The Committee acknowledge that this is an issue on which there are strong views held by both sides of the argument. Consequently, the Committee has attempted to formulate recommendations which it believes are in the best interests of the community as a whole.

Peter Beattie, MLA
Chairman
2 October 1990

**Recommendations**

**RECOMMENDATION l. (page 30)**

**THE COMMITTEE RECOMMENDS THAT THE PARLIAMENT ACCEPTS THE VIEW ON HOMOSEXUALITY PUT FORWARD BY THE ANGLICAN CHURCH IN RELATION TO MORAL AND RELIGIOUS QUESTIONS, THAT IS, THAT CHURCHES DO NOT NEED, NOR SHOULD THEY SEEK THE COMPULSION OF LAW IN ORDER TO UPHOLD THEIR MORAL POSITION (see page 23 of this report).**

**RECOMMENDATION 2. (page 33)**

**THE COMMITTEE IS OF THE VIEW THAT HOMOSEXUAL ACTS BETWEEN CONSENTING MALES IN PRIVATE SHOULD NO LONGER BE A CRIMINAL OFFENCE IN QUEENSLAND. ACCORDINGLY, THE COMMITTEE RECOMMENDS TO THE ATTORNEY-GENERAL THAT THE APPROPRIATE CHANGES BE MADE TO THE CRIMINAL CODE OF QUEENSLAND AND THE LIQUOR ACT 1912-1985 TO DECRIMINALISE HOMOSEXUAL ACTS BETWEEN CONSENTING MALES USING THE SOUTH AUSTRALIAN AND VICTORIAN LEGISLATION AS A GUIDE FOR SEXUAL OFFENCES COMMITTED IN PUBLIC.**

**RECOMMENDATION 3. (page 34)**

**THE COMMITTEE RECOMMENDS ADOPTION OF THE APPROACH FOLLOWED IN SOUTH AUSTRALIA AND VICTORIA IN RELATION TO PUBLIC OFFENCES, THAT IS, A HOMOSEXUAL ACT IS AN OFFENCE IN PUBLIC IN THOSE CIRCUMSTANCES WHERE A HETEROSEXUAL ACT WOULD ALSO CONSTITUTE AN OFFENCE IN A PUBLIC PLACE.**

**RECOMMENDATION 4. (page 35)**

**IN RELATION TO THE OFFENCE OF SOLICITING, THE COMMITTEE RECOMMENDS THAT A GENDER NEUTRAL APPROACH SHOULD BE ADOPTED AND THAT HETEROSEXUAL SOLICITING AND HOMOSEXUAL SOLICITING BE TREATED AS THE SAME. THAT IS, THAT HOMOSEXUAL SOLICITING BE AN OFFENCE IN SITUATIONS WHERE HETEROSEXUAL SOLICITING IS ALSO AN OFFENCE. THE COMMITTEE IS OF THE VIEW THAT ANY AMENDMENTS TO LEGISLATION SHOULD BE DONE IN GENDER NEUTRAL LANGUAGE. (THIS PRINCIPLE IS ENDORSED IN POINT 3 ON PAGE 60 OF THE CRIMINAL JUSTICE COMMISSION'S REPORT)**

**RECOMMENDATION 5. (page 35)**

**THE COMMITTEE RECOMMENDS THAT THE PROPOSED CHANGES TO THE LAW TO PROVIDE FOR HOMOSEXUAL LAW REFORM SHOULD IN NO WAY ADVERSELY AFFECT THE EXISTING LAW IN RELATION TO PROTECTING CHILDREN OR THE NEED TO GUIDE PUBLIC DECENCY.**

**THE COMMITTEE RECOMMENDS THAT THE RELEVANT PROVISIONS OF THE CRIMINAL CODE SHOULD REMAIN BUT BE MADE GENDER NEUTRAL. RAPE, FOR EXAMPLE, SHOULD APPLY EQUALLY TO MALES AS WELL AS TO FEMALES, THE LAWS IN RELATION TO PUBLIC DECENCY AND THE PROTECTION OF CHILDREN SHOULD REMAIN. THIS WOULD MEAN THAT THERE WOULD BE A NEED TO REMOVE INCONSISTENCIES BETWEEN PENALTIES BASED ON THE GENDER OF EITHER THE PERPETRATOR OR THE VICTIM OF THE OFFENCE. THIS WOULD PROTECT CHILDREN AND OTHERS IRRESPECTIVE OF THEIR GENDER. (POINT 4 OF THE CRIMINAL JUSTICE COMMISSION'S REPORT ON PAGE 60)**

**RECOMMENDATION 6. (page 43)**

**THE COMMITTEE RECOMMENDS THAT STRONG SUPPORT BE GIVEN TO THE AIDS EDUCATION CAMPAIGN AND FIGHT AGAINST AIDS BEING WAGED BY THE FEDERAL AND STATE GOVERNMENTS AROUND AUSTRALIA. THE COMMITTEE IS OF THE VIEW THAT DECRIMINALISATION OF HOMOSEXUALITY BETWEEN CONSENTING MALES WILL GO A LONG WAY TO ESTABLISHING SELF ESTEEM IN THE HOMOSEXUAL COMMUNITY AND TEREFORE ACT IN A SIGNIFICANT WAY TO COMBATING THE AIDS CRISIS CONFRONTING THE COMMUNITY. SELF-ESTEEM IS NECESSARY IN THE FIGHT AGAINST AIDS.**

**RECOMMENDATION 7. (page 49)**

**THE COMMITTEE RECOMMENDS THAT THE 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, (THIS PRINCIPLE IS HIGHLIGHTED IN POINT ONE ON PAGE 60 OF THE COMMISSION'S REPORT.)**

**RECOMMENDATION 8. (page 50)**

**IN RELATION TO LIMITED DEFENCES BEING AVAILABLE TO A HOMOSEXUAL PERSON MISTAKING A PARTNER'S AGE AS BEING ABOVE THE AGE OF CONSENT, THE COMMITTEE RECOMMENDS THAT ALL DEFENCES AVAILABLE TO A CHARGE OF CARNAL KNOWLEDGE OF A GIRL**

**UNDER THE AGE OF CONSENT SHOULD BE EQUALLY AVAILABLE TO A SIMILAR CHARGE AGAINST A MALE FOR UNDER AGE HOMOSEXUAL CONDUCT. (THIS PRINCIPLE IS ENDORSED IN POINT 4 ON PAGE 60 OF THE COMMISSION'S REPORT.)**

**RECOMMENDATION 9. (page 63)**

**THE COMMITTEE RECOMMENDS THAT IF A BILL IS INTRODUCED INTO THE PARLIAMENT TO AMEND LAWS WITH RESPECT TO HOMOSEXUALITY SUCH BILL SHOULD INCLUDE A PREAMBLE.**

## 1. INTRODUCTION

The Criminal Justice Commission's report on Homosexuality was released publicly on Friday 1 June 1990 on behalf of the Committee by the Chairman of the Parliamentary Committee at a news conference.

It was released publicly in this way so as to invite as many public submissions as possible from interested individuals and organisations.

The advertisements placed on 9 June 1990 in major papers throughout Queensland and papers with circulation inter-state were designed to ensure that all Queenslanders were aware of the Criminal Justice Commission's report and that they had an opportunity to have a direct say on the report to the Committee and in turn to this Parliament.

Over 2,000 written submissions were received. Pursuant to the Criminal Justice Act 1989-1990 and the March 21st resolution of the Parliament, the Committee held public hearings on 6 and 7 August 1990. The purpose of the public hearings was to publicly review the matters raised by the Criminal Justice Commission in its report by taking evidence from interested organisations and individuals. These represented a wide variety of views and attitudes and included advice from experts regarding several important issues.

The Criminal Justice Commission's report, the written submissions received from the public and the oral evidence received from the two days of public hearings informed the Committee in such a way as to enable its members to formulate this final report to Parliament.

The Committee regarded this process as a significant step towards enabling informed debate to take place within the community and within the Parliament.

From the written submissions the Committee selected 17 organisations to appear before its public hearings. The Committee also decided to call Mr Royce Miller QC, the Director of Prosecutions. He, of course, had not put in a written submission. He was called to provide expert evidence to assist the Committee.

The selection task for the organisations was difficult because many more than 17 interested organisations or individuals went to considerable effort to assist the Committee. The selection was based on those which could, as far as possible, provide a representative view of the wide range of issues involved and from whom the Committee wanted further information or expansion on their written submission. Many of those whose submissions were complete and self-explanatory were therefore not needed and not called. Their submissions were read and considered.

The witnesses called before the Committee appeared in a professional capacity or were members or representatives of the following:-

**Monday 6 August 1990**

1. The Queensland Association for Gay Law Reform.
2. The Assemblies of God.
3. The Brisbane Youth Service.
4. The Baptist Family of Churches.

5. The Social Welfare Secretariat of the Roman Catholic Archdiocese of Brisbane.
6. The Australian Family Association.
7. Queensland Psychologists for Social Justice.
8. The Lutheran Church of Australia.
9. The Queensland Council for Civil Liberties.

**Tuesdav 7 August 1990**

10. Phillip Tahmindjis, Acting Associate Professor of Law at the Queensland University of Technology.
11. The Presbyterian Church.
12. The Religious Society of Friends (Quakers).
13. The Social Issues Committee of the Synod of the Anglican Diocese of Brisbane.
14. Dr Jim Rodney, Australian and New Zealand College of Psychiatrists.
15. The Public Sector Union.
16. The Uniting Church.
17. Royce Miller QC, Director of Prosecutions for Queensland.
18. The Queensland AIDS Council.

Those called undoubtedly represented a cross section of views on this important issue. The Committee did not require those giving evidence to do so on oath, but witnesses were made aware that that did not alter the importance of the hearing and that any deliberate misleading of the Committee could lead to the matter being reported to Parliament.

At the public hearings, those giving evidence were asked to make introductory remarks and

were then questioned by all members of the Committee. The hearings were held in the Sherwood Room at City Hall and special provision was made for the general public to be present. A large number of the general public took advantage of this opportunity of viewing the proceedings.

The Committee stressed at the public hearing that it regarded written submissions as being the most substantive and important part of the submission process but nevertheless regarded all evidence put before the Committee as being important. This of course, included oral evidence and the opportunity to ask questions.

The Committee is firmly of the view that the public hearings were an important and significant part of the process allowing the public an opportunity to have a direct input to our report to this Parliament and accordingly the appropriate legislation. All parties who appeared before the Committee treated the process with respect and the Committee was greatly encouraged by the success of the public hearings.

The Committee also had the opportunity to discuss homosexual law reform in Perth, Adelaide, Auckland and Wellington on its visits to those cities.

The information paper prepared by the Criminal Justice Commission sets out significant facts and information which has been put before the people of Queensland and this Parliament. This Committee's report will attempt to avoid any unnecessary duplication of the information contained in the Commission's report.

In the interests of simplicity and brevity, factual material considered by the Committee arising out of the Commission's report will be referred to in this Committee's report by direct reference rather than repeated here.

## 2. LAWS OF QUEENSLAND

Appendix A of the Criminal Justice Commission's Information Paper sets out the relevant Queensland laws. There is no need to repeat them in full but it is essential to paraphrase them in order to understand their scope and tenor

1. Section 208 makes unlawful three offences of which two are relevant for present purposes:
   (1) carnal knowledge of any person against the order of nature; or
   (2) . . . . .
   (3) permitting a male person to have carnal knowledge of him or her against the order of nature;

Upon conviction of these offences, which are commonly referred to as sodomy or buggery, the offender is guilty of a crime, and is liable to imprisonment with hard labour for seven years. This section refers to offences committed between heterosexual as well as homosexual partners.

2. Section 209 is concerned with an attempt to commit the offences referred to in section 208.

3. Section 210 is concerned with the indecent treatment of children under sixteen. The section refers to indecent dealings and acts, wilful and unlawful exposure of indecent acts to a child, and exposure to indecent objects, books or films etc. The maximum penalties upon conviction range from five to ten years depending on the age of the child.

4. Section 211 is the main provision referring exclusively to practices between males. It provides:

> Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years.
>
> The offender may be arrested without warrant.

5. Section 215 deals with offences relating to carnal knowledge of girls under sixteen.

6. Section 336 provides that:

> Any person who assaults another with intent to have carnal knowledge of him or her against the order of nature is guilty of a crime, and is liable to imprisonment with hard labour for fourteen years.

7. Section 347 defines the offence of rape:

> Any person who has carnal knowledge of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.
>
> In the preceding paragraph "married woman" includes a woman living with a man as his wife though not lawfully married to him and "husband" has a corresponding meaning.

8. The Commission also referred to section 78 of the **Liquor Act 1912-1985** which makes it an offence for "prostitutes, thieves, drug dealers, sexual perverts or deviants, child molesters or persons of notoriously bad character, or drunken or disorderly persons" to be in or upon licensed premises.

Only section 211 specifically applies to conduct between two males. The other sections could apply to heterosexual as well as homosexual contact. There are other relevant provisions:

9. Section 337 of the Code provides that any person who-

(1) unlawfully and indecently assaults another;
(2) . . . . .
is guilty of a crime, and is liable to imprisonment for seven years.

10. **Section 4(1)(viii)(d)** of the Vagrants, Gaming, and Other Offences Act of 1931 (as amended)(VGO) provides that any person who wilfully exposes his person in view of any person in any public place shall be deemed to be a vagrant.

ll. **Section 7(e)** of the VGO provides that behaviour in a public place which is "riotous, violent, disorderly, indecent, offensive, threatening, or insulting is unlawful.

It needs to be pointed out that in evidence before the Committee, the Acting Associate Professor of Law at the Queensland University of Technology, Mr Phillip Tahmindjis, argued that in fact the title of the Commission's report was incorrect in that homosexuality is not illegal in Queensland but rather the various provisions of the Criminal Code make homosexual

acts illegal, not homosexuality itself. He told the Committee that:

> "Homosexuality as such is not a crime in this State and according to my research, never has been. It is homosexual practices which may be engaged in by homosexuals or heterosexuals alike and therefore this Committee is not looking at legalising homosexuality, it is looking at decriminalising certain practices which homosexuals, among other, can engage in." (Hansard: 93)

This has the legal effect that a gay mardi gras for example, according to Mr Tahmindjis, is not illegal in Queensland at this moment provided the requisite permits are obtained. He said that the:

> "fact that someone parades down the street in a lawful parade, effectively saying, 'I am a homosexual' and in other respects is not committing any other summary offences or breaching the Vagrants, Gaming and Other Offences Act, is perfectly possible, legally speaking". (Hansard: 98)

The above provisions relate to acts that occur in public and private.

**In Public**

They relate to both homosexual and heterosexual acts which, committed in public, are considered to be "indecent" and therefore unlawful. "Indecent" is defined as "offending against recognised standards of propriety" and "gross" as "glaring or flagrant" (The Macquarie Concise Dictionary, 2nd Ed). The difference in the attention given to them is located in the difference in public attitude and the consequent approach of the criminal justice system, and the nature of the public places used by homosexual men to express their homosexuality in view of its criminality. For example, fellatio between two men in a public place would be an offence under section 211 of the Code (gross indecency). However, fellatio between a woman and a man would be an offence under the VGA. Lesser indecent acts are dealt with as indecent or offensive behaviour or wilful exposure under the Vagrants, Gaming and Other Offences Act.

Homosexual men are commonly charged under these sections of the VGO. In cases involving police entrapment, the charge of indecent assault under section 337(l) is often used. The Committee received a number of submissions outlining the use of entrapment by police whereby police officers dress and act provocatively in order to attract the attention of homosexual men and then arrest them for indecent behaviour or assault.

**In Private**

An act done in private, such as sodomy, is unlawful between consenting couples whether they are homosexual or heterosexual. The difference in the attention given to it by the criminal justice system also resides in the community's perception of homosexual behaviour. Whilst sections of the community condemn sodomy, its policing is almost exclusively associated with homosexual men. Similarly, fellatio between two men in private is also an offence under section 211. However, as between a woman and a man in private, it is not an offence.

## 3. LAWS OF OTHER STATES AND JURISDICTIONS

The Commission's Information Paper in Chapter 4 provides a comparison with Legislation in the other Australian States as well as in England and Wales, the United States (California), Canada and New Zealand.

It also provides an Information Table in Chapter 5 covering such things as the year legislation was introduced to decriminalise homosexuality, relevant age of consent and the effect of the legislation introduced.

The Committee refers Honourable Members to the three pages of tables in the Commission's report on pages 57, 58 and 59. In summary there are only two Australian States where homosexual acts between consenting adults in private are illegal. They are in Queensland and Tasmania.

During the last 30 to 40 years a number of countries have decriminalised homosexual acts between consenting adults in private as have all other Australian States. In fact, six jurisdictions in Australia have decriminalised homosexual behaviour and they include South Australia (1975), the Australian Capital Territory (1976), Victoria (1980), the Northern Territory (1983), New South Wales (1984) and Western Australia (1989).

The Tasmanian Law Reform Commission recommended decriminalisation of homosexual acts in 1982, but the State Parliament did not agree with its recommendations. Currently in Tasmania, the Accord between the present government and the Green Independents provides

for decriminalisation of homosexual acts between consenting adults in private. The Tasmanian Parliament has not yet debated this issue.

In England the **Sexual Offenders Act 1967** decriminalised homosexual acts between consenting adults in private and other decriminalisation measures were followed in Canada in 1969, California 1975 and New Zealand in 1986.

The New Zealand **Homosexual Law Reform Act 1986** removed criminal sanctions against consensual homosexual conduct between males and decriminalises anal sex generally. The legislation makes no mention of privacy.

## 4. THE FITZGERALD REPORT

Reference has already been made in the Chairman's Preface to relevant passages of the Fitzgerald Report.

However, it is worth examining the report's comments on page 186 where Commissioner Fitzgerald said the following:-

> "The Criminal Code and other statutes forbid and control many activities in which ordinary people commonly, willingly engage. In some instances a number of different provisions apply to a single activity. Examples of such activities of immediate relevance, broadly categorised, are:
>
> * Voluntary sexual behaviour which is regarded as immoral, degrading and anti-social, especially prostitution (Vagrants, Gaming other Offences Act 1931-1987, Criminal Code) : . . . . . .
>
> It would take an enormous amount of police time and other resources to properly enforce these laws and at present, it is not adequately done.
>
> Properly enforcing laws which prohibit behaviour which is wide spread, difficult to detect and difficult to prove places enormous demands upon law enforcement resources and diminishes the resources available for the enforcement of other laws . . . . . .
>
> Law which are difficult to enforce may also lead to inroads into individual civil liberties as endeavours are made to improve the law enforcement process... . . . .
>
> **Laws should reflect social need, not moral repugnance. Unless there are pressing reasons to do so, it is futile to trv and stop activities which are certain to continue and upon which the community is divided. To do so takes resources away from the policing of other activities which the community considers undoubtedly wrong;, such as violence and fraud.**
>
> Where the moral issue is one upon which there is room for serious 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 or defenceless that their involvement is not truly voluntary."

These quotations from page 186 of the report clearly indicate an attempt by the Commission of Inquiry to come to terms with such controversial issues as homosexual law reform.

The Committee believes that these parts of the report provide clear guidance to the Legislature and should be given serious consideration by Members when they are debating and discussing this issue.

It is also worth pointing out a further quote on page 188 where the report draws a very clear distinction between legalisation and decriminalisation. The report points out that:-

> "Legalisation and decriminalisation are not the same. Legalisation means that the activities are made legal and are no longer regulated in any way. Decriminalisation means the activities are no longer crimes, and the participants are no longer liable to criminal penalties, but their activities are regulated by law and transgressors can still be penalised."

As can be seen from the above, former Commissioner Fitzgerald was giving a clear lead on issues such as this and the Committee felt it important to incorporate his views in this report.

## 5. THE CJC REPORT

As indicated previously, the report by the Criminal Justice Commission entitled "Reforms in Laws Relating to Homosexuality" was an Information Paper and did not contain a specific recommendation on decriminalisation itself; that was left to this Parliamentary Committee after seeking the views of the public and interested groups.

**However, the Commission's report did provide valuable** recommendations, guidance and information as a sound basis for not only this report but discussion in the community. This is particularly true of Chapter 5 headed "Options for Queensland".

Clearly, a valuable part of the recommendations of the Fitzgerald process was having an independent body such as the Criminal Justice Commission prepare appropriate reports containing information and recommendations which would assist the legislature in making important decisions on sensitive and difficult issues.

The crucial issue of importance to the Committee and dealt with by the Commission in parts of Chapters 1 and 2 is homosexuality and the AIDS crisis. This is covered at some length further in this report.

Chapter 2 of the Commission's report deals with "Inter-state Parliamentary debates on the decriminalisation of homosexuality" and briefly covers such issues as:-

Reforms overdue for laws that are obsolete

Inequalities between sexes and age

Mental health issues

Corruption of youth

Safety of children - sexual abuse

Sex education in schools

Health issues - the spread of disease - particularly AIDS

Religious and moral issues

Contributing to the breakdown of the nuclear family

All these arguments were considered by the Committee in preparing this report. Members who seek more details on those arguments are recommended to read Chapter 2.

It is worth highlighting Chapter 3 which deals with public opinion on homosexuality including public opinions surveys and surveys in Australia on the issue, and the majority support for decriminalisation.

In relation to Chapter 5 of the report, it deals with options for Queensland and raises a number of issues which the Commission suggests should be dealt with when this matter is discussed. This Chapter also includes some suggested recommendations.

The Committee has considered these points and has dealt with them, especially in our recommendations.

## 6. RELIGIOUS AND MORAL ARGUMENTS

The Churches who presented written reports or appeared and gave oral evidence before the Committee reflected diverse views. It was quite clear that Queensland Churches are not of one mind on the issue of homosexual law reform.

To illustrate this point the following are some relevant extracts from submissions provided to the Committee:-

(i) **Anglican Church - (Social Issues Committee of the Synod of the Anglican Diocese of Brisbane)**

**Changes to the Law Based on Equality**

"The Committee recommends that the present law be repealed and that private homosexual acts between consenting adults ceased to be a criminal offence. It recommends further that the Active Repeal carry with it an introductory statement indicating that such removal from the Statute Books is based upon the principle of the equal treatment for all before the law and does not imply moral approval of homosexual acts. On such matters the laws in Queensland, as in most other parts of the Commonwealth and other parts of the world, should be neutral on this matter." (submission:7)

**The Role of the Criminal Law**

"It is the task of criminal law in the area of sexual and interpersonal relations to be concerned with such acts of violence, abuse or other matters as may threaten vulnerable people or minors, or which may undermine their general health and well being. However, it is not the task of the criminal law to intrude into those private activities, freely and voluntarily entered into by consenting adults, provided those acts neither deny the liberties of other, nor harm them in a demonstrable way." (submission:4)

**Freedom of the Individual**

"The individual is thus free under the law to live the kind of life he or she chooses, so long as it does not directly impinge upon the free choice and liberty of other

people. This is an important qualification to the right of freedom and would need to be taken into consideration by those Christian groups seeking to use the law to impose their moral judgement upon those who engage in homosexual acts." (submission:3)

**The Role of the Church**

"The churches, as institutions vitally concerned with morality and values have a role and a responsibility in promoting a decent and well ordered society which is based upon mutual respect, compassion and justice. They must ensure that their members are helped to relate their personal faith (which is outside of the law) to general ethical principles and then to translate these into daily conduct. The churches do not need, nor should they seek the compulsion of the law in order to uphold their moral position." (submission5)

**Legal Neutrality of Homosexual Acts**

"The decriminalisation of homosexual acts does not imply moral approval of such behaviour which many may regard as immoral in terms of traditional Christian teachings. The central point is that private, voluntary and consenting homosexual acts should be viewed as being legally neutral in the same way as heterosexual acts of intercourse are presently regarded." (submission:6)

(ii) **The Catholic Church (Social Welfare Secretariat of the Roman Catholic Archdiocese of Brisbane)**

**The Current Law Reform**

"This submission does not deny the need for reform of the law, nor does it recommend that homosexuality be removed from the criminal code." (submission:4)

**The Role of the Law**

"The law is no longer a teacher of Christian values. Its primary role is to regulate those issues that society decides are required for its own well-being, those external acts and values that affect the common good, understood here as public peace, the essential protection of human rights, the commonly accepted standards of moral behaviour in a community and the protection of those adjudged to need protection." (submission:5)

**Privacy, Human Rights and the Law**

"On the question of privacy, our society now seems to accept that law need not concern itself with behaviour in private that does not conflict with human rights. The Human Rights and Equal Opportunities Act 1986, for example, enshrine as the values of the International Covenant on Civil and Political Rights, which stipulates as its first provision that 'all people have a right to privacy'.

The Church would never approve of legislation that would authorise the unjust violation of privacy. We would not want to keep on the statute books for repressive legislation which even theoretically could be used to authorise the invasion of the privacy of individuals.

However, a pluralist society does not mean that every groups' opinions should be written into law, and we would not support the decriminalisation of homosexual acts in private between consenting adults if this would be interpreted as publicly condoning such acts. Our view would remain that even though these acts were not illegal they are immoral and detrimental to the proper development of family life in a healthy society.

We believe it should be possible to have good law which, while condemning homosexual practices, does not condone the invasion of privacy. We refer with approval to the preamble of the legislation in the Western Australian Parliament. People of homosexual conditions should enjoy the same basic human rights as other people in the community. In particular, they have the right to be protected from harassment and discrimination." (submission:5)

**The Role of the Law and Decriminalisation**

"Granted the limitations of law in a pluralist society, there are still strong reasons to keep some statutes which deal with the question of homosexuality, but we endorse the current understanding that laws are not required to regulate private behaviour that does not infringe any persons rights, and hence we would see reason for the decriminalisation of sexual acts between consenting adults in private. By 'adults', we mean those who have reached both discretion and maturity." (submission:9)

**Equality of the Sexes**

"Any proposed legislation should place males and females on an equal footing with regard to sexual offences. Where possible, laws re sexual crimes should not be gender specific." (submission:10)

**Age Defence**

"Any proposed legislation should provide for a limited defence for a homosexual person honestly and reasonably mistaking the partner's age or capacity for

responsibility." (submission:10)

(iii) **Lutheran Church of Australia**

**Difference between Sins and Crimes**

"Lutherans know that the Holy Scriptures do not condone homosexual behaviour, they forbid such behaviour. No Lutheran, faithful to the scriptures, can condone homosexual behaviour. The church will advise, counsel and support homosexuals in their efforts to seek help. They will not co-operate, for instance, in trying to find suitable partners for homosexuals.

However, the Church also realises that there is a difference between sin and crime. Homosexual behaviour is always sinful. It does not imply that it is always criminal." (submission:13)

**The Christian Tradition**

"The socio-moral fabric of our contemporary society clearly bears the marks of a long standing Christian tradition in which human values, responsibilities and moral accountability are seen as being of paramount importance." (submission:4)

**The Relevant Issues of Decriminalisation**

"The fundamental issues related to the socio-moral health of our society ought to be taken very seriously which implies that the following matters should be considered:-

- The unique significance of marriage and family formation.

- The moral health and protection of children and the young.

- The maintenance of the rules related to matters of public decency, public health and individual and communal responsibilities and rights.

- The protection of the homosexual man and woman from negative discrimination, harassment and persecution.

- The contents of the preamble to the existing Western Australian Legislation should be considered as the central part of proposed legislation in Queensland.

- The notion of homosexual behaviour as being a responsible "alternative lifestyle" should not be entertained in legislation.

- The idea of "homosexual marriages" should not be a legitimate part of any health

education programme of which students may or must participate.

- Homosexual acts between consenting male or female adults "in private" should not constitute criminal behaviour as defined by law.

- The proposed Queensland Legislation should deal with homosexual offences in the same way as it deals with other sexual offences and should be based on the principles and administration of justice by which the moral goods and rights of each and every citizen of the state are being protected." (submission:4)

(iv) **The Religious Society of Friends (Quakers)**

**Law Changes Needed**

"There should be changes in the Queensland laws relating to homosexual acts and homosexual relationships." (submission:1)

**Eliminate Discrimination and Protect Individuals**

"The Queensland laws should be changed to eliminate the discrimination against homosexuals in particular, and to remove the area of personal and emotional relationships between consenting adults from the realm of the criminal law.

In calling for this change, the Society is aware that the community still requires laws to protect individuals from offensive behaviour in public and to protect the victims of exploitative relationships." (submission:1)

(v) **The Uniting Church (Social Responsibility Committee of the Uniting Church in Australia (Queensland Synod)**

**The Law should not Discriminate**

"The laws should not discriminate against consenting male adults (that is of 18 years of age and above) who engage in homosexual acts in private." (submission:2)

Difference between Sins and Crimes

"This should not imply that The Uniting Church in Australia does not have anything to say about homosexuality - much, indeed, has been written and spoken about the rights and wrongs of particular relationships between individuals and between groups of people. As we see it, however, the CJC's reform process is more about rights and non rights (for the limits of human freedom). In this regard, the CJC should

understand the distinction which many Christians would seek to make between 'sins' and 'crimes'.

The process of reform (in this and other matters before the Commission) would, it is our belief, benefit from the education of the public about the precise meaning of 'decriminalisation'. For a long time in Queensland there has been the strong impression that some political and social forces have exploited the relative political illiteracy of the general public. Careful distinctions about the meaning and implications of law and administrative safeguards have been sacrificed for the sake of political agendas not particularly helpful to democratic and accountable government. Amongst the victims of this process have been otherwise 'law abiding' homosexual men." (submission:3)

**AIDS**

"The Committee would also like to draw society's considered attention to those people working in the areas of AIDS education and prevention who have stated their belief that current legislation in Queensland discourages homosexuals from coming forward for AIDS testing due to fear of prosecution." (submission:3.)

**Protection of the Young**

"The Committee would urge the CJC to take the necessary legal measures to ensure society's protection of people mentioned in the Commission of Inquiry, namely, those who are so young or defenceless that their involvement is not truly voluntary. Finally, in outlining support for reforms of the laws relating to homosexuality, the Committee would suggest that many Christians throughout the state would wish to temper the removal of criminal sanctions with a caution that further reforms be evaluated one at a time." (submission:3)

(vi) **Assemblies of God in Australia**

**Protection of the Innocent**

"It is necessary to retain the present law in order to protect the innocent." (submission:1)

**Demand for further Changes**

"We understand that "Decriminalisation" has far greater connotations than just the removal of criminal penalties. It does in fact leave the way open to the possibility of demanding further concessions such as: the freedom to present homosexuality as

'normal' in school education programmes (as is the policy of the NSW Teachers' Federation) the equating of homosexual relationships with marriage; the government funding of homosexual endeavours.

This will lead to further militant confrontations as we have seen in the Sydney 'Gay Mardi Gras' and more recently at the sixth International AIDS conference held in San Francisco on June 23 1990." (submission:l)

**Morality Based on Absolutes**

"Martin Luther King said "Morality can not be legislated but behaviour can be regulated. Judicial decrees may not change the heart but they can restrict the heartless". This decriminalising proposal becomes even more disconcerting when we look at the Queensland Education Department introducing a Human Relationships Education programme into our schools which challenges the presently held absolutes of morality and replaces them with values clarification. We suggest the next generation would be ignorant of a morality based on absolutes and will make its judgement based on relativity or on what the majority or loudest opinion considers to be right. This necessitates the law upholding absolutes in those areas that are detrimental to society's well being.

Decriminalisation of homosexuality would be acting irresponsibly for our next generation. We urge your upholding of the present law and help protect our children's' futures." (submission:l)

**Scriptural References – Objections**

"There are numerous scriptural references to God's objection to homosexuality: Leviticus 18:22 "Do not lie with a man as one lies with a woman; that is detestable" Leviticus 20: 13 "If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death: their blood will be on their own hands".

Romans 1:26/27 "God gave them over to shameful lusts (Greek word 'lusts' in the plural is "PATHE" and refers to the "vices of homosexuality').

Even their women exchanged natural relations for unnatural ones. In the same way the men also abandoned natural relations with women and where inflamed with lust for one another. Men committed indecent acts with other men, and received in themselves the due penalty for their perversion".

Corinthians 6:9 "Do you know that the wicked will not inherit the Kingdom of God. Do not be deceived: Neither the sexually immoral or idolaters nor adulaters nor male prostitutes nor homosexual offenders . . . . .."

God clearly condemns homosexual acts and states they are detestable to Him. We

accept in the New Testament there is grace and forgiveness in Christ. We accept that homosexuality is not the worst sin nor is it singled out as the only sin detestable to God, but there is clear biblical evidence it is an offence to God." (submission:6)

(vii) **Baptist Family of Churches in Queensland**

**Difficulty of Policing Homosexual Acts**

"We recognise that homosexual acts in private are difficult to police, yet we reiterate our opposition to decriminalisation of such acts." (submission:3)

**Support for Stronger Laws**

"We oppose presentation of homosexuality as an acceptable, normal alternative lifestyle and strongly request that it be prohibited in Human Relations courses in schools. We object to favourable presentation of the homosexual lifestyle in areas such as TV, videos, cinemas, theatres, print media and request legislative prohibition. We remain concerned about the affect of the promotion of homosexuality on impressionable young adults and call strongly for a review and strengthening of legislation and penalties in relating to involvement of 18 to 21 year olds in homosexual activity." (submission:3)

**Opposition to Decriminalisation**

"The Baptists of Queensland oppose decriminalisation of homosexual acts. We call upon the government to strengthen laws against homosexual acts and, also, to legislate against any activity that may promote homosexuality as an acceptable lifestyle including marches, demonstrations, festivals, media coverage and education programs in schools." (submission:4)

**Biblical &position**

"The Baptist Family of Churches sighted significant biblical quotes from Genesis, Leviticus and Romans to oppose homosexual law reform." (submission:l)

(viii)**The Presbyterian Church (The Public Questions and Communications Committee)**

**Opposition to Decriminalisation**

"That homosexuality be not decriminalised, and that there be no relaxation of

legislation with regard to homosexuality". (submission:3)

The Presbyterian Church's submission referred to biblical references, such as Corinthians, Leviticus, Deuteronomy, Romans, Timothy and Revelation to oppose homosexual law reform.

The above Church submissions are a representative sample of church opinion. They also reflect a wide cross section of views on the issue.

The Committee is of the opinion that the relevant quotes above from the Church submissions clearly indicate the different perspectives taken on this issue from a moral and religious perspective, covering concerns about privacy through to the various quotes from the Old Testament.

It should be pointed out that the above submissions are not the only ones received in relation to moral and religious concerns but the Committee has simply chosen to reiterate relevant parts of the submissions from Churches who appeared at our public hearings to give some indication of the cross section of views.

The Committee accepts the view that the majority of major Churches favour changes to the law to decriminalise homosexual acts between consenting males in private. We support that majority view.

**RECOMMENDATION 1.**

**THE COMMITTEE RECOMMENDS THAT THE PARLIAMENT ACCEPTS THE VIEW ON HOMOSEXUALITY PUT FORWARD BY THE ANGLICAN CHURCH IN RELATION TO MORAL AND RELIGIOUS QUESTIONS, THAT IS, THAT CHURCHES DO NOT NEED, NOR SHOULD THEY SEEK THE COMPULSION OF LAW IN ORDER TO UPHOLD THEIR MORAL POSITION.**

## 7. SOCIAL CONSIDERATIONS

**Discrimination, Civil Liberties, Privacy**

As stated earlier, the law prohibits acts which are not exclusively engaged in by homosexual men. However, homosexual men are almost exclusively prosecuted for offences such as gross indecency and sodomy between consenting parties. Whilst the Committee was not provided with any detailed statistics of the number of charges of consensual sodomy, evidence was provided that seven men had been charged with these offences, committed in private, over the last few years. These prosecutions usually arise out of evidence obtained in the course of other investigations by police and are prompted by open admissions of homosexuality. The reason why heterosexual couples who engage in similar behaviour are not also prosecuted to the same degree is probably due to the fact that there is not a similar interest by the community in inquiring into the private bedrooms of heterosexual partners. Policing of these laws therefore discriminates against homosexual men.

The Queensland Council for Civil Liberties provided two fundamental principles for consideration in relation to changes to the law and they were:-

> "1. that what adult persons do with consent of each other in private is of no concern to the criminal law;
>
> 2. that the criminal law should not discriminate against homosexual activity nor in favour of heterosexual activity." (submission:1)

The Council further submitted:

> "That homosexual law reform should be dealt with on the basis of urgency and with

> expedition. Of all the victimless crimes, homosexuality is one which can be removed from the law books with the least complication." (submission:6)

On the other hand the Australian Family Association took the view that:-

> "Some people feel that homosexuals have a right to do whatever they want, so long as they do it in private. There are a number of objections to this sentiment.
>
> Firstly, the law prohibits many acts that are committed in private, not just homosexual acts. A man does not have the right to take narcotic drugs in private. Nor does he have the right to commit incest with a 'consenting son or daughter in private'. The law can intrude into the privacy of the home in these areas, why not in the area of homosexual behaviour?
>
> Secondly, privacy does not lend legitimacy to wrongful behaviour. A wrong action does not suddenly become right simply because it is performed in a private bedroom rather than a public toilet.
>
> Thirdly, private acts have public consequences. Homosexual behaviour imposes considerable medical and financial costs on the community. Because of its unhygienic nature, homosexual sex is responsible for the spread of many diseases, the most serious of which is AIDS." (submission:3)

The Committee however, is persuaded by the point raised in the submission from the Catholic Social Welfare Secretariat mentioned earlier that:-

> "On the question of privacy, our society now seems to accept that law need not concern itself with behaviour in private that does not conflict with human rights. The Human Rights and Equal Opportunities Act 1986, for example, enshrines the values of the International Covenant on Civil and Political Rights, which stipulates as its first provision that "all people have a right to privacy". (submission:5)

The Committee is also mindful of the fact that the law which prohibits the use of narcotics to prevent against self injury is a law that is applicable to all members of the community not just a section of the community. Also, laws which prohibit incest are in place to prevent the exploitation of children who are in a relationship of trust with their parents. These matters can

be distinguished from laws relating to homosexuality.

The Committee notes the submission from Mr Philip Tahmindjis, the Acting Associate Professor of Law at the Queensland University of Technology, when he points out that under section 30(b) of the **Human Rights and Equal Opportunity Act 1986:**

> "...the federal Human Rights Commission is empowered to investigate allegations of 'discrimination'. This term is defined in Section 3 and in the regulations which came into force on January 1 1990 as meaning: 'any distinction, exclusion or preference made on the ground of . . . . sexual preference . . . . that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'. The Regulations also provide that discrimination on the grounds of imputations of sexual preference and with respect to a former sexual preference are covered".
>
> "The provisions of the **International Labour Organisation Convention 111** on which this section is based (and which gives it constitutional validity under the 'external affairs' power of Section Sl(xxix)) indicate that it also applies to vocational training. This provision clearly extends to Queensland by operation of Section 30 of the Act. "Compensation, monetary or otherwise, can be obtained from breach of these provisions." (submission:20)

Evidence was provided to the Committee in relation to blackmail and discrimination in employment resulting from homosexuals becoming known and exploited.

**RECOMMENDATION 2.**

**THE COMMITTEE IS OF THE VIEW THAT HOMOSEXUAL ACTS BETWEEN CONSENTING MALES IN PRIVATE SHOULD NO LONGER BE A CRIMINAL OFFENCE IN QUEENSLAND. ACCORDINGLY, THE COMMITTEE RECOMMENDS TO THE ATTORNEY-GENERAL THAT THE APPROPRIATE CHANGES BE MADE TO THE CRIMINAL CODE OF QUEENSLAND AND THE LIQUOR ACT 1912-1985 TO DECRIMINALISE HOMOSEXUAL ACTS BETWEEN CONSENTING MALES USING THE SOUTH AUSTRALIAN AND VICTORIAN LEGISLATION AS A GUIDE FOR SEXUAL OFFENCES COMMITTED IN PUBLIC.**

In recommending that homosexual acts, including sodomy, no longer be criminal offences in Queensland, the Committee accepts the principle that what persons do with consent of each

other in private is of no concern to the criminal law. (Queensland Council for Civil Liberties submission: 1)

The Commission's Paper on page 60 raises the question as to whether there should be a distinction drawn between public and private homosexual conduct.

South Australian and Victorian legislation makes no mention of privacy in their legislation. It is left to gender neutral offences in public.

In the other Australian states, homosexual acts are not offences if committed in private. There are, however, problems in trying to follow jurisdictions other than Victoria and South Australia. For example, the Northern Territory's definition of "in private" is:-

> "With only one other person present and not within the view of a person not a party to the act."

The Criminal Justice Commission argues that "The definition is too wide to be effective. A better definition of privacy would be similar in form to that found in the Canadian Criminal Code. The Canadian definition of "in private" is as follows:-

> "An act shall be deemed not to have been committed in private if it is committed in a public place, or if more than two persons take part or are present. (CJC Report:60)

**RECOMMENDATION 3.**

**THE COMMITTEE RECOMMENDS ADOPTION OF THE APPROACH FOLLOWED IN SOUTH AUSTRALIA AND VICTORIA IN RELATION TO PUBLIC OFFENCES, THAT IS, A HOMOSEXUAL ACT IS AN OFFENCE IN PUBLIC IN THOSE CIRCUMSTANCES WHERE A HETEROSEXUAL ACT WOULD ALSO CONSTITUTE AN OFFENCE IN A PUBLIC PLACE.**

The Criminal Justice Commission's Information Paper on page 61 and Appendix A set out the necessary sections to be amended as well as the current law. There is little point in repeating them here. The Committee takes the view that the amending Act should simply be titled "An Act to amend the Criminal Code etc."

It follows from the above discussion that when the law is being amended consideration should also be given to points 3 and 4 raised in the Commission's Report on page 60.

These points cover homosexual soliciting, public decency and protecting children. The Committee accepts the advice from the Criminal Justice Commission in point three on page 60 that:-

> "It is advisable that the gender neutrality approach be adopted and that homosexual soliciting only be an offence in situations where heterosexual soliciting is also an offence".

**RECOMMENDATION 4.**

**IN RELATION TO THE OFFENCE OF SOLICITING, THE COMMITTEE RECOMMENDS THAT A GENDER NEUTRAL APPROACH SHOULD BE ADOPTED AND THAT HETEROSEXUAL SOLICITING AND HOMOSEXUAL SOLICITING BE TREATED AS THE SAME. THAT IS, THAT HOMOSEXUAL SOLICITING BE AN OFFENCE IN SITUATIONS WHERE HETEROSEXUAL SOLICITING IS ALSO AN OFFENCE. THE COMMITTEE IS OF THE VIEW THAT ANY AMENDMENTS TO LEGISLATION SHOULD BE DONE IN GENDER NEUTRAL LANGUAGE. (THIS PRINCIPLE IS ENDORSED IN POINT 3 ON PAGE 60 OF THE CRIMINAL JUSTICE COMMISSION'S REPORT)**

**RECOMMENDATION 5.**

**THE COMMITTEE RECOMMENDS THAT THE PROPOSED CHANGES TO THE LAW TO PROVIDE FOR HOMOSEXUAL LAW REFORM SHOULD IN NO WAY ADVERSELY AFFECT THE EXISTING LAW IN RELATION TO PROTECTING CHILDREN OR THE NEED TO GUIDE PUBLIC DECENCY.**

**THE COMMITTEE RECOMMENDS THAT THE RELEVANT PROVISIONS OF THE CRIMINAL CODE SHOULD REMAIN BUT BE MADE GENDER NEUTRAL. RAPE, FOR EXAMPLE, SHOULD APPLY EQUALLY TO MALES AS WELL AS TO FEMALES. THE LAWS IN RELATION TO PUBLIC DECENCY AND THE PROTECTION OF CHILDREN SHOULD REMAIN. THIS WOULD MEAN THAT THERE WOULD BE A NEED TO REMOVE INCONSISTENCIES BETWEEN PENALTIES BASED ON THE GENDER OF EITHER THE PERPETRATOR OR THE VICTIM IN THE OFFENCE. THIS WOULD PROTECT CHILDREN AND OTHERS IRRESPECTIVE OF THEIR GENDER. (POINT 4 OF THE CRIMINAL JUSTICE COMMISSION'S REPORT ON PAGE 60)**

## 8. MEDICAL AND HEALTH CONCERNS

The Committee's considerations placed a great deal of weight on its concern about the spread of HIV/AIDS or Acquired Immune Deficiency Syndrome.

The Commission's Report specifically deals with the issues of AIDS in Chapters 1 and 2. It makes particular reference to a national HIV/AIDS strategy - a Policy Information Paper which argues that laws penalising homosexual activity "impede public health programs promoting safer sex to prevent HIV transmission, by driving underground many of the people most at risk of infections." (page 47 of the Paper.) The paper further states on page 47 that "Whilst homosexual acts remain illegal, people engaging in them will be deterred from presenting for testing, counselling, support and treatment. The Policy Information Paper stressed the role of education and recommended that the:-

> "State Government should review legislation, regulations and practices which may impede HIV education and prevention programs amongst people who work as prostitutes, homosexual men and people who work with them." (page 47 of the paper.)

The national HIV/AIDS strategy paper argues that:-

> "To ensure education messages are effective, an education strategy must address two categories of men who have sex with other men:
>
> - those who identify with the gay community, frequent gay social venues, are involved with a range of gay community organisations and are accessible to the gay media; and
>
> - those who, for reasons of identity (e.g. bi-sexual men), access or choice, do not identify with the gay community.
>
> A significant number of men have both heterosexual and homosexual relationships and encounters. Generally speaking, these men do not identify with the gay community, and their female partners are unaware of their homosexual behaviour. Women who know that

they have male partners who also have sex with men are able to take steps to protect themselves from infection." (page 29 of the paper.)

The effect of discrimination is to alienate groups with HIV (who are often members of already stigmatised groups such as homosexuals, prostitutes, and IV drug users). This causes increase of lack of self esteem and lowers the motivation to make sustained and responsible behaviour change.

Anti-Discrimination Legislation covering HIV status and sexual orientation would have an educative effect and would create an environment conducive to changing attitudes in the community." (page 65 of the paper.)

It is worth pointing out that on page 13 of the HIV/AIDS Policy Information Paper the following point is made about the spread of AIDS:-

"HIV is transmitted from one person to another through body fluids. Epidemiological studies have documented three modes of HIV transmission:

- through sexual intercourse with an infected person, most particularly anal and vaginal intercourse;
- through contact with infected blood, blood products or donated organs, bone graphs, tissue or semen; and
- from an infected woman to her child in the womb, possibly during birth, or from breast-feeding."

MS Elizabeth Reid, Director of the Division for Women and Development and Advisor to the Administrator on the AIDS epidemic of the United Nations Development Program, who represented the Queensland AIDS Council gave the following evidence to the Committee:

"MS Reid:... - initially the WHO identified three different patterns of transmission. Australia fitted classically into the first pattern, which was that the virus entered into a homosexual community and spreads through the homosexual community, which is to a great extent sexually closed. That is, a homosexual would transmit to another homosexual but not very often outside the group. This pattern was seen in Australia, Europe and the United States.

The second pattern that the WHO identified was the pattern that is known in Africa where there are equal numbers of women and men infected where probably the estimate is that 80 per cent or more of those infected were infected through vaginal intercourse - for Africa.

What is happening globally now is that we are seeing all countries and all patterns gradually move towards the pattern we have seen already in Africa. So that gradually

the heterosexual or, as we should more strictly call it, vaginal, intercourse is becoming the primary mode of transmission throughout the world and in most communities and subcommunities." (Hansard: 161)

MS Reid said further:

> "MS Reid:... I may have said that the virus first entered Australia into the homosexual community, which was sexually closed. What that meant was that the transmission occured from one homosexual to another homosexual rather than moving out through bisexuality or through intravenous drug use with known homosexuals into the broader community. But there is clear evidence in Australia that the virus is being transmitted in the general community itself.
>
> Mr Gunn: I am surprised that you did not mention, as we have a report from the Queensland Health Department, the great problem faced by the bisexual community.
>
> MS Reid: What I mentioned was men who have sex with men. Men who have sex with men may have sex only with men or they may have sex with men and women. Of course, your laws apply to men who have sex with men, whether or not it is exclusive or otherwise.
>
> I want to briefly refer to bisexuality in Australia. Very many people identify bisexuals as "the channel" into the general population and have focused in on them. We do not know who are bisexuals in Australia. We do not know their behaviour patterns or anything else. But they are not the only risk group. WHO has identified those who are mobile - those who travel, those who leave home and go elsewhere - as being a significant group at risk. There are plenty of people in Australia who are moving around the world and going by themselves to parts of the world where there is quite a high incidence of HIV infection, particularly amongst those with whom they would have casual sex. So there are a lot of ways in which the virus is entering and spreading into the general community in Australia." (Hansard:168)

The Committee is firmly of the view that no responsible legislature anywhere in the world in 1990 can ignore the significant impact AIDS is having on world health and amongst the Australian and Queensland community generally, covering both heterosexuals and homosexuals. The Queensland AIDS Council argue strongly for decriminalisation of homosexual acts between consenting males on the grounds that it would raise self esteem and thereby encourage AIDS testing. This in turn would have a serious impact on reducing the spread of AIDS in the community.

The Queensland Association for Gay Law Reform said:-

> "In the 'age of AIDS' it is vital for the community as a whole that men and women at risk are free at all times to seek HIV testing, treatment and counselling. The existing law, due to its penal provisions, actively discourages this in that homosexual men coming forward risk possible criminal sanctions.
>
> Public health advertising aimed at homosexual men, as a statistically high risk group, is unable to be seen as positive or encouraging in any way, as to do so may constitute a conspiracy to commit a crime. It is obvious that advertising aimed at homosexual men will be far more effective if it is able to be, at the very least, non judgmental in respect of the lifestyle of that section of the community it seeks to reach. It is an accepted fact that by raising self esteem of gay men in general, they are far from likely to behave sexually in a manner which does not place themselves or their partners at risk." (submission:3)

The submission goes on to say that:-

> "Counselling is made more difficult in that people are less likely to come forward and seek assistance if doing so places them not only at emotional, but also at some considerable legal risk, accordingly productive lives are lost with vast human energy being wasted." (submission:3)

And further:

> "The only reasonable affect that criminal sanctions can possibly have, considering sexuality is largely unalterable is to hamper efforts to control the spread of the AIDS virus. It seems significant that even in an unsupportive environment, the homosexual community has effectively educated itself, as it continues to do, in safe sex practices. This is reflected in the stabilisation of new reported AIDS cases in the homosexual community. This effective safe sex campaign also results in a substantial lessening of transmission of AIDS to the broader community. It should not be forgotten that in many parts of the world, such as Africa, AIDS is as prevalent in the heterosexual community as it is amongst homosexuals in this community. The importance of co-operating and gaining the support of the gay and lesbian community in the fight against AIDS is therefore clear." (submission:3)

The Queensland AIDS Council pointed out that:-

> "It is interesting to note that South Australia which had decriminalised homosexuality in 1975 had as at 18 May 1990 394 notifications of persons testing HIV antibody positive,

> Queensland on the same date had 892 persons registered as testing HIV antibody positive. On a per capita comparison South Australia has a .028% infection rate while Queensland has a higher infection rate at .032%. It is obvious that decriminalisation of homosexuality has not increased the spread of AIDS in South Australia."
>
> It is argued that decriminalisation of homosexuality, would encourage homosexuals to come forward for HIV testing, counselling support treatment as they no longer face possible prosecution under the law. Decriminalisation will also, although slowly, affect and change public attitudes and acceptance and contribute to the enhancement of a positive self image of homosexual persons. This positive self image, in turn is intrinsic to the acceptance and continued practice of safe sexual activity". (submission:12)

In oral evidence, the AIDS Council said that the most recent WHO analysis showed that 60% of those currently in the world with AIDS obtained that disease from vaginal intercourse, 15% through anal intercourse (men and women) and that of the eight million people infected with AIDS five million were men and three million were women. (Hansard: 160, 161.) The Committee is of the view that the decriminalisation of homosexuality between consenting adult males would have a significant impact in reducing the spread of AIDS into the community generally. The removal of legal sanctions would encourage homosexuals to be tested for AIDS and the practice of safe sex.

The Committee is particularly concerned about ensuring that an appropriate education campaign is run directed at encouraging the practice of safe sex in high risk groups including bi-sexual males who may be living in a heterosexual relationships.

The Committee accepts the submission from Dr P J Tucker, the Deputy Director of the Queensland Department of Health, who said in his written submission:-

> "It is important to note that the spread of HIV/AIDS results from certain risk behaviours (e.g. anal intercourse, needle sharing, vaginal intercourse) which are not confined to homosexual populations. There is little doubt that the illegality of male homosexual activity (sodomy, attempted sodomy, 'indecent' practices) has impeded some of the

> public health efforts to monitor, prevent, and manage the HIV/AIDS epidemic and STD's in general.
>
> Education and prevention, surveillance data systems, testing and notification programs, early treatment and secondary prevention programs, treatment of STD's etc. - have all been difficult for homosexual people to access because of understandable mistrust of services of a government which regards them as criminals. The problem has been even greater amongst bisexual men who usually identify with the heterosexual community and guard their homosexual activity with the utmost secrecy - so that even their wives and children do not suspect anything.
>
> If gay communities throughout the world hadn't taken collective, public spirited action to prevent and manage the AIDS epidemic, the situation would be far worse, with an 'African pattern' of spread largely in the heterosexual community." (submission:3)

Psychiatrist, Dr Jim Rodney, from the Australian and New Zealand College of Psychiatrists gave oral evidence before the Committee on Self-Esteem and AIDS Education. He was asked:-

> "THE CHAIRMAN: Does it follow then that self-esteem is fundamentally important to people listening to AIDS education, having themselves treated and taking appropriate action in that quarter?
>
> Dr Rodney: Yes, certainly. It is all causality. It is all connected. If you are feeling good about yourself, you can express your sexuality. If there are risks of AIDS, you are more likely to be educated in the roles of safe sexuality. As well, you are more likely to go to counselling if there is some dilemma or problem about this. One of the problems with homosexuality being hidden away is that we cannot be up front, we cannot assist and cannot go along with educational programs. People feel victimised. They feel poor self-esteem and they feel lesser people - lesser beings - because somehow they are made to feel different or guilty or dirty. This is a societal thing; it is not just a legislative thing. However, our society has let this group remain like this. This is one way we can change it; to produce decriminalisation." (Hansard: 134)

Psychologist Dr Gallois of the Queensland University was asked at the Committee's public hearings:-

> "In your professional experience, are you saying that in Queensland the existing law causes a climate in which homosexuals are reluctant to be tested for AIDS?

**Dr Gallois:** I believe that is so." Hansard:67)

**RECOMMENDATION 6.**

**THE COMMITTEE RECOMMENDS THAT STRONG SUPPORT BE GIVEN TO THE AIDS EDUCATION CAMPAIGN AND FIGHT AGAINST AIDS BEING WAGED BY THE FEDERAL AND STATE GOVERNMENTS AROUND AUSTRALIA. THE COMMITTEE IS OF THE VIEW THAT DECRIMINALISATION OF HOMOSEXUALITY BETWEEN CONSENTING MALES WILL GO A LONG WAY TO ESTABLISHING SELF ESTEEM IN THE HOMOSEXUAL COMMUNITY AND THEREFORE ACT IN A SIGNIFICANT WAY TO COMBATING THE AIDS CRISIS CONFRONTING THE COMMUNITY. SELF-ESTEEM IS NECESSARY IN THE FIGHT AGAINST AIDS.**

The Committee is of the view that such a campaign should be directed at high-risk groups including the young, to adopt safe sex practices. The campaign should be non-judgmental and embrace the Committee's view that decriminalisation of homosexuality is necessary in the fight against AIDS.

## 9. PSYCHIATRIC AND PSYCHOLOGICAL FACTORS

The Committee took evidence from Dr Cynthia Gallois, a senior lecturer in the Psychology Department at the University of Queensland and Stephen Cox a senior teaching fellow at Griffith University on behalf of Queensland Psychologists for Social Justice, and from Dr Jim Rodney, Chairman Elect of the Queensland Branch of the Australian and New Zealand College of Psychiatrists.

### Sexual Identity

The evidence put before us from the Queensland Psychologists for Social Justice concludes that:-

> "Homosexuals are a large group in society. It is also shown that sexual orientation is formed in childhood and is highly restricted to change thereafter. Homosexuality is not a form of psychological maladjustment, however the present social and legal situation does lead to psychological distress for substantial numbers of individuals, in particular adolescents. Homosexuality does not lead to any negative consequences for society, but social tensions do arise as a result of the law and lead to verbal and physical harassment of homosexuals.
>
> The scientific evidence presented in this submission therefore leads to the conclusion that the present laws with regards to homosexual acts are in opposition to social justice and indeed produce harm to society and individuals. It is this group's belief that homosexuality be decriminalised and full equality in all regards between homosexuals and heterosexuals be written into the law." (submission:14)

They added:

> "The vast majority of research findings into homosexuality conclude that homosexual (as are heterosexual) feelings are a fundamental part of an individual's psyche, and are not something that is consciously chosen (Paul and Weinrich, 1982). Research indicates that sexual orientation develops at a very early age, perhaps by the age of six (Money 1988) and certainly by early adolescence (Bell, Weinburg & Hammersmith, 1981 etc.)." (submission:4)

The submission also pointed out that:-

> "What ever the causes of sexual orientation are, attempts to alter sexual orientation have by and large, not met with success (Money & Wiedeking, 1980). Once established, a homosexual orientation (as with a heterosexual orientation) is highly resistant to change... In summary then, the weight of evidence seem to suggest that sexual orientation is formed by early childhood, and definitely before puberty and is not amendable to clinical intervention. Homosexuals, as with heterosexuals, do not choose their sexual orientation, it is not a preference. The available data also suggests that it is highly improbable that otherwise heterosexually orientated adolescents can be 'converted' to homosexuality. Legislation (criminalisation or decriminalisation) in relation to homosexual acts will not effect the incidence of homosexuality. In fact, a study examining the effects of decriminalisation of homosexual acts in several states in the United States of America found that there was no difference in the amount of private homosexual behaviour as a result of decriminalisation (Geis, Wright, Garrett and Wilson, 1976)".(submission:5)

The Committee received submissions such as that from the Assemblies of God in Australia which claimed that:-

> "Scores of our Ministers could bear testimony of the many homosexuals they have seen reinstated to a happy, enjoyable, normal heterosexual life. We have a compassionate ministry to those who want to be helped out of their homosexuality. We know the change can take place." (submission:5)

In oral evidence, Mr Cox said about such claims as those from the Assemblies of God that:

> "I would be sceptical about that. I would want to know their methods and how they defined homosexuality, what their follow-up was. It is definitely a unique finding". (Hansard:68)

These issues were put directly to Psychiatrist Dr Jim Rodney in oral evidence. He concluded as follows:-

> "THE CHAIRMAN: . ..You say in your submission-

> ‘There is no evidence that homosexuality is a mental illness, nervous condition or aberration of the mind. Sexual orientation is a complex multifactional phenomena which is still not totally understood.’

Do you know at what age sexual orientation takes place?

Dr Rodney: Yes. Again, some of this is scientific research. Getting the cause and effect is difficult because, as I said, making the point, these are areas that are very complex. But there is research evidence to suggest that sexual orientation per se is influenced right from the word go, right from intra-uterine life, early childhood, through the whole of childhood up to adolescence. I think most research areas would consider that by adolescence - around puberty time - sexual orientation per se, which is different from sexual roles and sexual identity; maybe I need to clarify some of these areas as well - sexual orientation by puberty time tends to be fairly fixed, tends to be fairly immutable by that stage.

THE CHAIRMAN: Just peeling back the reason for my asking the question, it is basically this: it is relevant to the age of consent. In your view, in terms of sexual orientation, when boys and girls reach the age of 16, for example, what, in your understanding, is the position of sexual orientation.

Dr Rodney: By far the very vast majority would have quite fixed ideas about their sexual orientation. If you look at studies, studies will indicate the vast majority, 90 to 95 per cent. Obviously there is this area of polymorphic sexuality, if I can expand on that. I think we can all understand the word. No-one, I don’t think, is purely heterosexual or purely homosexual. You can toss around the ideas of continuums and so on and so forth, and there are some difficulties in doing that. Perhaps I won’t go into those.

I think the point that I am making is that the vast majority of people, by the age of 16, will be quite fixed in their sexual orientation. They are really a small group because of this polymorphic drive that we all have. They might have some doubts, they may have some confusion. But they are a very small group. I think they tend to often get overrepresented- this whole idea of sexual seduction by the same sex and so forth. Much of that is fallacy when you look at the literature. There is very little evidence that people going through these areas, if they are seduced at times, are going to end up changing their sexuality.

THE CHAIRMAN: You say that that simply isn’t true?

Dr Rodney: It is not true. There is very little evidence for it. Sure, people who go through seduction may have that effect. But if you follow some of these groups they will end up going back to the sexual orientation they tend to be, except for a very small group.

THE CHAIRMAN: In other words, those people who have put before us submissions in that area - what you would say in response to that is that if someone did go through

the stage of seduction, if their orientation was heterosexual, it doesn't mean they would come out homosexual?

**Dr Rodney:** Precisely. That's what I am saying.

**THE CHAIRMAN:** I am trying to get to the nub of the matter, if I can put it in those terms. One of the groups who put a submission before us said that they had indeed had programs - and I guess they saw them as rehabilitation; I certainly don't see them in those terms - where people who were homosexuals went through some church program and then went to being heterosexual and lived a life-style accordingly. Is that change a reality?

**Dr Rodney:** I would have very serious doubts about that. Reading all the literature and having worked in the sexual area for a long time with a lot of people who have doubts and so on and so forth, the evidence I think is that it is very doubtful that people can produce significant changes in sexual orientation. It doesn't matter what type of therapy they undergo - analytic, behavioral, cognitive, religious, aversive therapies; I know them all. I have been in studies included in them. The outcomes are very, very poor. The results are very poor if one thinks that you are going to take someone and change their sexual orientation. Modern psychiatric thinking is such that very few homosexual people present for any sort of change. They are usually a very small minority group and the psychiatric effect and the therapeutic effect on that sort of level is to help them to adjust to be able to accept and live with that sexual orientation.

**THE CHAIRMAN: You** say in your submission that homosexuality is not a mental disease. Do you know the cause of it?

**Dr Rodney:** Again, there are a lot of different theories, but there seems to be a lot of research that is going on and there is considerable evidence now for a biological element - considerable evidence. Again, I would be happy to talk about that if you wish to. The evidence comes from twin studies. If you look at twin studies - adoption studies of taking people away from families, bringing them up in another family, obviously to try to sort out this intriguing nature versus nurture dilemma that we often face in psychiatry. Twin studies show quite a higher, what is called, concordance rate of homosexuals in identical twins - monozygotic twins. It has been reproduced in several studies. The suggestion is that there is quite a biological element that predetermines all this. We know that. It has been repeated. There are other suggested familial studies. If you look at homosexual siblings, there is a higher incidence in families where there is one homosexual member. Again, that is suggestive of some basic, biological element. I personally see it as a biological void. If you look at any bell-shaped curve you will get different changes - be they hormonal, constitutional or genetic. The way that the distribution appears to be, it seems very likely that that plays a very important role. I am not excluding environmental causes as well. Psychiatrists work with environmental causes all the time. What I am saying is that there does seem to be very good, strong evidence that there is a biological element, but then perhaps environmental factors may either condition or change as one goes along.

**The CHAIRMAN: So** what you are saying, in essence, is that it is not necessarily a

life-style by choice; it is a determination generally?

**Dr Rodney:** There is no choice. Homosexuals don't choose to be homosexuals when they become adults."(Hansard: 132)

The Committee was of the view that the professional advice put before it concludes the following:-

1. Sexual orientation is most likely determined early and while the age is not determinable it is most likely before puberty.

2. Once sexual orientation is determined it is very difficult if not impossible to change.

3. The law regardless of whether it makes homosexual acts between consenting males in private legal or not has little impact or no impact on the practice of homosexuality in private. Its impact is in relation to whether safe sex is practiced and whether the community is susceptible to particular AIDS education programs.

4. The evidence seems to suggest that homosexual orientation is not a matter over which homosexuals have any control in the same way heterosexuals have no control over their sexual orientation.

**Age of Consent**

These conclusions are fundamentally important to the "age of consent" question.

If sexual orientation of both boys and girls is determined early and most likely before puberty, then the age of consent for males should be the same as for females irrespective of whether the sexual act is heterosexual or homosexual.

The Criminal Justice Commission's Information Paper points out that:-

> "It would accord with principles of sexual equality and anti-discrimination that the age of consent for males and females be the same irrespective of whether the sexual act is heterosexual or homosexual. Western Australia is the only observed jurisdiction where the age of consent for homosexual acts is not the same as for heterosexual acts." (Point one of the Criminal Justice Commission's Information Paper on page 60.)

In oral evidence before the Committee Psychologist Dr Gallois was asked:-

> "THE CHAIRMAN: We were talking before about sexual orientation taking place at an early age. It is also true that girls mature faster than boys. It we are talking about an age of consent - be it 16, 18 or whatever, but let us deal with 16 -what is your professional opinion? Is the age of consent at that stage - both have obviously determined their sexual orientation, based on what you have said. Therefore, you would argue, presumably, that there would be no difference then in terms of the age of consent? Dr Gallois: I think that is what we would argue, and fairly strongly, particularly between boys and girls mainly because the suggestion that we have heard at any rate is that boys mature more slowly physically, which of course they do through childhood, and they reach puberty a little later. We are talking about age 13 or 14 now.
>
> Therefore, they may be emotionally less mature. The evidence coming from the survey data on adolescents and the vast majority of these people are heterosexual adolescents - is that boys start to have sexual activity earlier in their teenage years and are more sexually active than girls and they are no more emotionally involved in their sexual relationships than girls. They are more likely to have more sexual partners than girls at any given age through the teenage years and so forth. In the light of that to have a higher age of consent for boys on the grounds that they are less sexually mature does not reflect their behaviour. Their behaviour is that they have more experience than girls. (Hansard: 69)

**RECOMMENDATION 7.**

**THE COMMITTEE RECOMMENDS THAT THE 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. (THIS PRINCIPLE IS HIGHLIGHTED IN POINT ONE ON PAGE 60 OF THE COMMISSION'S REPORT.)**

Further, the CJC suggests an approach in relation to limited defences for mistaking the age of

> a partner. On page **60** the Commission raises the question "whether a limited defence should be available for a homosexual mistaking his partner's age as being above the age of consent."

The Commission then recommends that:

> "An approach should be adopted that all defences available to a charge of carnal knowledge of a girl under the age of consent should be equally available to a similar charge against a male for underage homosexual conduct."

The Committee endorses the recommendation from the Criminal Justice Commission and in doing so acknowledges the written submission from the Catholic Social Welfare Secretariat which said:-

> "Any proposed legislation should provide for a limited offence for a homosexual person honestly and reasonable mistaking the partner's age or capacity for responsibility." (submission: 10)

**RECOMMENDATION 8.**

**IN RELATION TO LIMITED DEFENCES BEING AVAILABLE TO A HOMOSEXUAL PERSON MISTAKING A PARTNER'S AGE AS BEING ABOVE THE AGE OF CONSENT, THE COMMITTEE RECOMMENDS THAT ALL DEFENCES AVAILABLE TO A CHARGE OF CARNAL KNOWLEDGE OF A GIRL UNDER THE AGE OF CONSENT SHOULD BE EQUALLY AVAILABLE TO A SIMILAR CHARGE AGAINST A MALE FOR UNDER AGE HOMOSEXUAL CONDUCT. (THIS PRINCIPLE IS ENDORSED IN POINT 4 ON PAGE 60 OF THE COMMISSION'S REPORT.)**

## 10. LEGAL ASPECTS

### Criminal Justice Administration

One of the central points made in the Fitzgerald Report in relation to the Criminal Law and Criminal Justice Administration is the quote on page 186 where the report deals with enforcing laws "which prohibit behaviour which is wide spread, (are) difficult to detect and difficult to prove (placing) enormous demands upon law enforcement resources".

In a practical sense the Committee is concerned about the practicalities and costs in enforcing the law against homosexuals and notes evidence put before it that there have been only seven prosecutions over the last five years.

Mr Royce Miller QC, the Director of Prosecutions, acknowledged in evidence before the Committee the difficulty of obtaining evidence for prosecutions. When asked: "(i)n terms of making an assessment of whether or not to proceed with a prosecution, presumably the evidence would be very difficult to obtain," Mr Miller responded "very difficult". (Hansard: 15 1)

He made the point that there should not be a law on the statute book that Parliament did not intend to enforce because if it was on the statute book it should be enforced. Mr Miller told the Committee that:

> "You get into trouble when you have laws on the statute books that are not enforced. Police officers have a sworn duty to enforce the law. I think that if there is a law on the

> statute books that you think should not be there - it is wrong - then you should have the courage to legislate to take it off the statute books. (Hansard:l56)

Difficulties in enforcing the law are further highlighted in the submission of Mr. Tahmindjis when he commented on two recent Queensland cases involving homosexual men:

> "Two men living at Nerang were charged after police, investigating another matter discovered that the pair were homosexual lovers. The matter was not dropped and the pair were eventually put on good behaviour bonds, i.e. convictions were recorded. They have since left Queensland. Who could blame them?
>
> In the second case, three men in Roma were charged with homosexual offences in private after the sister-in-law of one of them found compromising photographs and passed them onto the police.
>
> It can't be said in either of these recent cases that the application of the law and the actual treatment of these men were either necessary or proportionate for the best running of a democratic society. If these cases had happened in Europe they would be regarded as a clear and unquestionable breach of human rights. The fact that they are tolerated in Queensland must be unacceptable to any reasonable person".(submission:25)

The real question here, arising out of what was said in the Fitzgerald Report, is whether the legislature and the community want to see the limited resources of both the police service and the courts used to prosecute males involved in consenting homosexual activity in private. The Committee is mindful of the resources issue and views expressed by the Fitzgerald Report on page 362 where it says:

> "The Criminal Law should be reviewed. Considerable resources are used to detect and prosecute minor offences. The burden is then passed from the Police Department to the Court system and the Prisons".

The Committee is of the view that any resources used in pursuing the investigation, charging and putting on trial of consenting adults involved in homosexual practices in private is a waste

of public and community funds which can be better used in pursuing the perpetrators of organised and serious crime.

**Assaults**

Evidence was also provided in relation to assaults and other acts committed against homosexuals because of their homosexuality.

Without repeating those pieces of evidence in detail here it is sufficient to say that the Committee is strongly of the view that the legalisation of homosexual acts between consenting males in private will remove opportunities for blackmail and reduce the opportunities for discrimination in employment and hopefully in the long term will reduce and indeed abolish assaults against homosexuals because of their homosexuality.

The submission from the Queensland Association for Gay Law Reform takes the view:-

> "The prejudice and bigotry against homosexual men which manifests itself sometimes violently is presently supported by the Criminal Law. With decriminalisation the law will no longer be able to be used as a justification for unprovoked violence, wrongful dismissal from employment and the like. Obviously, decriminalisation will not instantly change some people's narrow perceptions and accordingly the Association strongly believes that anti-discrimination legislation such as that in place in New South Wales is the next step in the battle to obtain for homosexual men the same rights as their heterosexual counterparts.
>
> Decriminalisation will allow the establishment of a Gay - Police Liaison Group, previously impossible due to the existing state of the law, which will perform a dual purpose:-
>
> > (a) To monitor and control police activity in respect of the homosexual community with the aim of eliminating the violence which has been perpetrated by the police.

(b) To facilitate the reporting, investigation and prosecution of persons physically and psychologically assaulting gay people." (submission:2)

Mr Tahmindjis also pointed out in his submission that the effects of continued criminal sanctions against homosexuals will make gay men who have been raped or assaulted reluctant to report the offence to the police and leave them open to blackmail. He added that:

> "Men (gay or not) who have been subjected to lesser crimes such as robbery are reluctant to report the crime to police in case it implicates them (rightly or wrongly) with homosexual activity." (submission:28)

## Preamble

The Committee received a large number of submissions and a significant amount of material on the question of whether any amending legislation should contain a preamble.

In brief, a preamble is the- "Recitals set out in the beginning of a statute showing the reason for the Act". (Osborn's "A Concise Law Dictionary" 5th Edition:248)

A number of preambles came to the attention of the Committee as possible models for Queensland:

### Victorian Preamble

**The** Victorian Crimes (Sexual Offences) Act 1980 commences with the reasoning behind the passing of the Act and the principles which guide it:

(a) The desirability for the law to protect all persons from sexual assaults and other acts of coercion;

(b) The desirability for the law to protect persons from sexual exploitation especially exploitation by persons in positions of care, supervision and authority;

(c) The undesirability of the law relating to sexual behaviour to invade the privacy of the people of the state more than is necessary to afford their protection;

(d) The desirability for the law to protect and otherwise treat men and women so far as possible in the same manner;

(e) The abolition of obsolete rules of law; and,

(f) Parliament's intention not to condone immorality.

**Adapted Victorian Preamble**

The Victorian Preamble could be adapted by deleting clause (f) to provide a less moralistic preamble.

**Western Australian Preamble**

The Western Australia Law Reform (Decriminalization of Sodomy) Act 1989,is the result of a private members bill and its preamble was insisted upon by the State's Upper House. The preamble reads:

WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the Criminal Law;

AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;

AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;

AND WHEREAS, the Parliament does not by its action, in removing any criminal penalty for sexual acts in private between persons of the same sex, wish to create a change of community attitude to homosexual behaviour;

AND WHEREAS, in particular the Parliament disapproves of persons with care, supervision or authority over young persons urging them to adopt homosexuality as a lifestyle and disapproves of instrumentalities of the states so doing:

Be it therefore enacted by the Parliament of Western Australia."

**Preamble Suggested by the Anglican Church**

The Anglican Church recommended a further possible preamble in these terms:-

"That the act of repeal carry with it an introductory statement indicating that such removal from the statutes is based upon the principal of equal treatment for all before the law and does not imply moral approval of homosexual acts. On such matters the law in Queensland, as in most other parts of the Commonwealth in other parts of the world, should be neutral on this matter."

The views on this point vary widely.

## Arguments for a Preamble

The question of a preamble was raised with several witnesses who gave oral evidence before the Committee. One of these was Mr Royce Miller, Director of Prosecutions for Queensland.

**"THE CHAIRMAN:** I would like your advice as a professional. If this committee made a decision - and I stress that we have not yet made a decision - but if we made a decision to change the law to make it legal for consenting males in private to practise homosexual acts, including sodomy, but we had a preamble such as that to the front of the Act, what legal ramifications could that have?

**Mr Miller:** I read page 40 before I came here. In the second-last paragraph it says - 'The potential for uncertainties in interpretation in this preamble is obvious.' Not to me. If the sections which decriminalise the act are clear enough in their terms, it is not going to be whittled down in any way by the preamble. I can't see any problem at all. I thought it was advantageous to have that in the preamble, because it sets forth the view of the Parliament. All it is doing is decriminalising. It is not seeking to encourage that sort of conduct.

**THE CHAIRMAN: You** cannot foresee that having any legal effect at all?

**Mr Miller:** None at all, if, in fact, the sections which decriminalise are clear in their terms. A lot will depend upon what is said in the Act itself.

**THE CHAIRMAN:** What would happen then - again obviously this is hypothetical - if there was some ambiguity in the section itself? What would the court do then? Would it look to the preamble?

**Mr Miller: Yes.**

**THE CHAIRMAN:** What you are really saying is that the preamble would have legal effect only if the sections themselves were in some way open to interpretation by the court?

**Mr Miller: Yes.**

**THE CHAIRMAN:** But if they were clear, the preamble would not have any legal ramifications?

**Mr Miller:** That's right. That is my view. Perhaps the parliamentary counsel might have a different view, but that is my view.

**The CHAIRMAN: In** other words, we would have to get it right the first time, otherwise it would be irrelevant.

**Mr Miller: If the** Parliament expresses its intention in the clearest possible terms, there would not be any ambiguity. There would be no need to read down what is in the body of the Act by reference to the preamble.

**Mr Harper:** Would you agree that in the past, the courts have been very reluctant to read down comments made by the Parliament in any case, and would much prefer to strictly address the matters in the body of the law?

**Mr Miller:** I suppose that over 20 years ago, courts never had reference to what is said in the Parliament. The High Court has now said that it, itself, may do that and that appellate courts may also do that. I am not quite sure just how far that goes, but my view is that if you express in clear terms your intention, where there is no ambiguity and no room for argument as to the meaning of the section, then the preamble will not have any effect at all in diminishing or expanding the content of the section. It is only where there is a need to resort to some other means in order to determine the intent of the Parliament that one will resort to those means.

**Mr Harper:** Where there is a lack of clarity?

**Mr Miller: Yes.** (Hansard: 152, 153.)

It would appear that the legal effect of the preamble is that **provided** that there is no interpretative problems with any decriminalising legislation then the preamble has no effect. However, if the sections are open in some way to interpretation then **a Western Australian type** preamble could lead to a reading down of the legislation in a way not intended by Parliament.

The argument in favour of the Western Australian Preamble is put in the submission from the

Catholic Social Welfare Secretariat who argue:

> "The intent of the whole preamble of the West Australian legislation should be retained in any Queensland Legislation". (submission: 10)

and:

> "A pluralist society does not mean that every group's opinions should be written into law, and we would not support the decriminalisation of homosexual acts in private between consenting adults if this would be interpreted as publicly condoning such acts. Our view would remain that even though these acts were not illegal they are immoral and detrimental to the proper development of family life in a healthy society.
>
> We believe it should be possible to have good law which, while condemning homosexual practices, does not condone the invasion of privacy. We refer with approval to the preamble of the legislation in the West Australian Parliament." (submission:5)

The Anglican submissions from the Social Issues Committee of the Anglican Diocese of Brisbane said:

> "The Committee recommends that –
>
> the present law be repealed and that private homosexual acts between consenting adults cease to be a criminal offence. It recommends further that the Act of Repeal carry with it an introductory statement indicating that such removal from the statute books is based upon the principle of equal treatment for all before the law and does not imply moral approval of homosexual acts. On such matters the law in Queensland, as in most other parts of the Commonwealth and in other parts of the world, should be neutral on the matter." (submission:7)

**Arguments Against a Preamble**

The Information Paper from the Criminal Justice Commission on page 40 makes these points in relation to the Western Australian Preamble:-

> "The potential for uncertainties in interpretation in this preamble is obvious. The first

> clause of the preamble states that sexual acts between consenting adults in private ought not to be regulated by the Criminal Law. The remainder of the preamble imputes moral condemnation of those same sexual acts.
>
> Principles of statutory interpretation suggest that in the interpretation of the Act by a court (and indeed by the public at large) the Court must read the Act as a whole, including the preamble. Hence, if an ambiguity should arise in the interpretation of the legislation, a preamble such as this could lead to a reading down of the legislation in a way not intended by Parliament. It should also be noted that preambles in legislation usually do not refer to policy matters and are generally restricted to a factual account of the legislation. Accordingly, the preamble is not in accordance with usual statutory drafting principles in Queensland."

QUT Acting Associate Professor of Law, Mr Phillip Tahmindjis, expresses similar reservations to the Western Australian Preamble and its possible legal effects. He said:

> "With respect to the Preamble to the legislation in Western Australia which decriminalised homosexual activities in private in 1989... .In effect the Preamble says to the homosexual population of Western Australia: "We hate your guts but we're not going to throw you in goal any more." I agree with the Criminal Justice Commission's comments on page 40 with respect to the problems of statutory interpretation that may arise due to the preamble.
>
> What should also be considered, however, is that the Preamble, together with sections 23 and 24 of the Act, may be contrary to International Law... "(submission:25)

In particular, these provisions of the Western Australian Act could breach Articles *25* and 26 of the **International Covenant on Civil and Political Rights** to which Australia is a signatory. Article *25* guarantees the right to take part in public affairs and to have access, on general terms of equality, to public service, and Article 26 states the right that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It states specifically that:

> "...the law shall prohibit any discrimination and guarantee to all persons equal protection against discrimination on any ground such as race, colour, sex,..(etc)...or other status."

There is reason to doubt the capacity of the Western Australian legislation to provide a

guarantee of equal protection against discrimination for all persons in that State.

Mr Tahmindjis argued that:

> "These matters have not been pursued in any detail as it has never been the practice of the Queensland legislature to include preambles in legislation. To alter this practice in this instance would, in my opinion, cause many more problems than it might be thought would be solved." (submission:26)

In a written submission, Mr W.A.Lee, formerly Reader *in Law at the University* of Queensland and a Part-time Commissioner for Law Reform, commented on the Western Australian and Victorian preambles. He said:

> "The Preamble of the Western Australian legislation as well as two sections headed "Proselytizing unlawful" were introduced to the Parliament by the Hon. Peter Foss MLC a member of the Legislative Council. A group of members of the Council insisted that these provisions be included as a trade off for the decriminalisation. However it must be remembered that the Legislative Council in Western Australia is the product of an electoral gerrymander and it can and does insist on legislating minority views. As a legislative precedent the Western Australian Preamble should therefore be treated with great caution.
>
> In my opinion both the Preamble, and the provisions contained in the Act under the heading "Proselytizing Unlawful" are bad law. The main reason for my view is that they introduce uncertainty as to both meaning and consequence. As the Western Australian Preamble stands some persons will consider themselves to be justified in taking all sorts of actions against homosexuals, as follows."

In relation to the Victorian preamble, Mr Lee stated:

> "Although I believe that preambles do more harm than good I nevertheless do not find the Victorian preamble to be objectionable."

Mr Lee then outlined in his submission six scenarios which could be brought about by the WA preamble, of which two are recited here:

> "(1) A public servant might consider that public moneys should not be expended on

> counselling homosexuals about the risks they run of contracting AIDS. Any public programme of encouraging sufferers from AIDS to continue to live with (and be cared for by) their homosexual partners might be regarded by some as contrary to government policy...
>
> (5) The Western Australian preamble would justify an employer in refusing employment to a person in a homosexual relationship. It could be regarded as encouraging something of which Parliament disapproves.'

These two cases perhaps provide examples of the possible violation of the Articles of the International Covenant mentioned above.

There are other issues involving the Preamble. The Queensland Association for Gay Law Reform argues that:-

> "It is important to note that the most recent legislative model - Western Australia is seriously defective in that it creates major health education and promotion difficulties, in addition to offending the basic desire to produce morally non judgmental and effective legislation." (submission:7)

In oral evidence before the Committee, the Gay Law Reform Association representatives argued that the Western Australian Preamble will have a significant impact on self-esteem and consequentially this will impact on the effectiveness of AIDS education amongst homosexuals. Mr Ward for the Gay Law Reform Association said:-

> "The preamble in Western Australia is specifically stating that homosexuals are second class citizens". (Hansard:11)

The Queensland AIDS Council argued the importance of self-image and self-esteem to the practice of safe sex. Their submission said that:-

> "Positive self-image, in turn is intrinsic to the acceptance and continued practice of safe sexual activity". (submission: 12)

In oral evidence, Professor Beverley Raphael, Professor of Psychiatry at the University of Queensland and Director of the National Centre for HIV Research, who appeared for the AIDS Council said:-

> "Self-esteem is extremely important. Indeed, in studies being carried out in my department, we have found that the fall of self-esteem in infected people creates greater difficulties for them in maintaining safe sexual practices. The low self-esteem of many members of the homosexual community has been well established in community-based studies, particularly in association with the level of stigma and discrimination." (Hansard: 162)

And further:

> "Someone who feels that the world has rejected them has little reason to make a commitment to either their own self-care or a responsibility for other." (Hansard: 162)

Also appearing for the AIDS Council at the Committee's public hearing was Ms Elizabeth Reid who currently works for the United Nations Development Program in New York. Her position there is Director of the Division for Women and Development, and Adviser to the Administrator on the AIDS epidemic and development.

Ms Reid made these points in relation to the Western Australian Preamble:-

> "I am much more seriously concerned about the sort of preamble that has occurred in terms of the Western Australian Legislation . ..I think that the workings of that preamble is such that it would go against everything that you are hearing in evidence from us...
>
> If a wording were adopted in the Preamble similar to that of Western Australia, this would absolutely undermine all of the efforts to create an environment within which we can both acknowledge the humanity of these people and allow us and them to enter into a dialogue to prevent further transmission of this virus." (Hansard:164)

**RECOMMENDATION 9.**

**THE COMMITTEE RECOMMENDS THAT IF A BILL IS INTRODUCED INTO THE PARLIAMENT TO AMEND LAWS WITH RESPECT TO HOMOSEXUALITY SUCH BILL SHOULD INCLUDE A PREAMBLE.**

## REPORT INTO THE REPORT OF THE CRIMINAL JUSTICE COMMISSION TITLED "REFORMS TO LAWS RELATING TO HOMOSEXUALITY - AN INFORMATION PAPER"

## REPORT OF THE PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE DISSENTING CONCLUSIONS: HON W A M GUNN, HON N J HARPER AND MR S SANTORO M's.L.A.

Fundamental to any consideration of the Report and Information Paper "Reforms to Laws Relating to Homosexuality" prepared by the Criminal Justice Commission is the very real difference between "legalisation" and "decriminalisation". We believe there is a lack of understanding and appreciation of that difference in the community generally so that any suggestion that laws relating to homosexual acts should be amended is all too frequently construed as being a suggestion to legalise those acts.

In our view the Committee's deliberations have centred on the question of whether the act of sodomy should continue to be an offence under the Criminal Code when practised in private between two consenting adults, male and male or male and female.

We are convinced that the health risks (ie the spread of sexually transmitted diseases including the AIDS virus) to the community generally should be reduced by amendment to the Criminal Code to "decriminalise the act of sodomy when that act takes place in private, without any third party being present, between consenting adults.

However, it should be appreciated that medical evidence appears to indicate that the AIDS virus is transmitted predominantly by anal intercourse, so that any decision by society either through the Parliament or otherwise which is seen to condone sodomy must be detrimental to the health of the community generally.

In our opinion the other major consideration is the ability to enforce the law as it presently stands. We are convinced that it is not possible to effectively enforce this law.

Overall, and as a result of these considerations, argument is advanced that the Criminal Code should be amended to remove as an offence the act of sodomy when practised in private between consenting adults. In our opinion any such amendment should only be countenanced if a preamble to the legislation clearly indicated that the act of sodomy was neither encouraged nor condoned by the Parliament through any such amendment.

It has become patently clear during the course of the Committee's deliberations and inquiries that, by and large, those within the so-called "gay group within the Queensland community would reject any such preamble as negating any amendment to the Criminal Code intending to "decriminalise sodomy when practised in private between consenting adults.

Accordingly, whilst it may be argued that such an amendment <u>should</u> lessen the incidence of sexually transmitted diseases, particularly the AIDS virus, in practice that would probably not

be the case. Subsequently the substantial argument for amendment to the Criminal Code becomes void.

A consideration to which appropriate weight must be given is the effect which amendment to the Criminal Code in the manner suggested could have on those males who, either through genetic make-up or association, have an inclination towards homosexual behaviour but are inhibited from practising sodomy because society expresses its view that the act is one which should be regarded as an offence under the Criminal Code.

After our deliberations, having regard to all factors put forward, on balance we recommend that the Criminal Code not be amended to decriminalise the act of sodomy.

**Preamble**

Recognising that this is a minority view within the Parliamentary Criminal Justice Committee we further recommend that, if the Government is minded to so amend the Criminal Code, the following preamble be included:

Whereas this Parliament believes that homosexual activity (whether consisting in sodomy or otherwise) between adults is morally reprehensible

And whereas this Parliament however does not believe that it is the role of the criminal law to regulate consensual behaviour between adults in private

And whereas this Parliament does not in any way condone or encourage homosexual activity (whether consisting in sodomy or otherwise) or homosexual lifestyle

And whereas this Parliament does not in any way equate or regard a homosexual relationship as equivalent to marriage (whether legal or de facto)

And whereas this Parliament does not believe that homosexual couples should be given any recognition in law including any rights to adopt children take under any law of intestacy or any right which is recognised in law as arising from any relationship between a male and a female

And where this Parliament believes that any homosexual relationship between an adult (whether male or female) with a child (whether male or female) must be punished by the strongest possible criminal sanctions

And whereas this Parliament believes that any promotion of homosexual activity (whether consisting in sodomy or otherwise) or a homosexual lifestyle must be punished by the strongest possible criminal sanctions

And whereas this Parliament believes that any solicitation for homosexual activity must be punished by the strongest possible criminal sanctions which must be even more severe in the case of a child as the intended victim

And whereas this Parliament believes that any attempt to teach or promote homosexual

practices or lifestyle in any school, College of Advanced Education or University must be punished by the strongest possible criminal sanctions.

And whereas this Parliament believes that any action to produce, publish, sell or distribute any material in whatever form which in any way promotes or depicts homosexual activity or lifestyle as desirable should be punished by the strongest possible criminal sanctions.

In regard to penalties - we are of the opinion that penalties relating to sodomy practised other than in private, soliciting or procuring and offences against minors or juveniles should be significantly increased and present curbs on police in gaining and presenting admissible evidence should be modified or removed.

It must be recognised that the forthcoming report of the Criminal Justice Commission in regard to prostitution has relevance to these issues, for male brothels interstate are reputed to reflect extremely degrading standards of human behaviour.

Provision should also be made for inclusion of the following clauses in preparation of any amending Bill:

**PROMOTION OF HOMOSEXUAL ACTIVITY OR LIFESTYLE**

(1) It is an offence for any person to –

(a) encourage, promote or advocate homosexual activity (whether consisting in sodomy

or otherwise) or a homosexual lifestyle;

(b) produce, publish, sell or distribute any material, whether written, printed or reproduced in any form, which encourages, promotes, advocates or depicts as desirable homosexual activity (whether consisting in sodomy or otherwise) or a homosexual lifestyle.

Penalty: 250 penalty units or 1 year imprisonment.

(2) If an offence under subsection (1) occurs during the course of teaching or attempting to teach at a school, College of Advanced Education or University then the following penalty is to apply.

Penalty: 500 penalty units or 2 years imprisonment.

**HON W A M GUNN MLA** **HON N J HARPER MLA** **S SANTORO MLA**

**THE FOLLOWING RECOMMENDATION IS SUBMITTED BY MR ROBERT SCHWARTEN MLA (ROCKBAMPTON NORTH) AND MRS MARGARET WOODGATE MLA (PINE RIVERS) IN RELATION TO RECOMMENDATION 9.**

The Committee has decided that any Bill to be submitted to Parliament concerning homosexual law reform should contain a preamble. No agreement was reached as to the content of same and consistent with this situation we recommend that the Government request the Attorney General to prepare a Bill for submission to Parliament which contains a preamble reflecting the following views:

As members of the Parliamentary Criminal Justice Committee, we have studied the preambles which precede legislation of a similar nature in other states. Particular note was taken of those which apply in Western Australia and Victoria to which reference is made elsewhere in the report. It is our view that whilst these may be employed as frames of reference in the drafting of an appropriate preamble to Queensland legislation, the Western Australian model is somewhat severe and by some judgements not without potential legal difficulties for sometime in the future.

Our contention is that the issue of homosexual reform is a divisive and complicated issue for the community to grapple with and as such the preamble must reflect the intent of Parliament in decriminalising homosexual acts in private between consenting adults. Therefore, such a preamble should specify that it is not the business of Parliament to pass laws which would effectively intrude into the private behaviour of consenting adults. Further, that the Parliament in passing such legislation does not seek to condone nor condemn homosexual acts in private

between consenting adults.

Much was said at the open public hearings regarding the effect that proposed decriminalisation of homosexual acts in private would have on our youth. Whilst it is our view that these concerns are baseless we nevertheless believe that the preamble should set out clearly the Parliament's view on how such legislation will address this concern.

The preamble should also deal with the issue of public decency, since there appears to be a view that any legislation which seeks to decriminalise homosexual acts between consenting adults in private, will automatically cause a flourish of public promiscuity between homosexuals. Therefore, it is imperative that the preamble makes a statement which aims to correct this misapprehension.

**Robert Schwarten MLA**
**Member for Rockharnpton North**

**Margaret Woodgate MLA**
**Member for Pine Rivers**

**STATEMENT OF DISAGREEMENT**

**by**

**MR P BEATTIE MLA**

**in relation to Recommendation 9**

As Chairman of the Parliamentary Criminal Justice Committee it is my responsibility to draft reports to be put before the whole Committee for its consideration.

It therefore goes without saying that I am in full support of almost all aspects of this Report and certainly the first eight recommendations. Those eight recommendations are the majority recommendations of the Committee and are put before the Government and the Parliament for Legislative consideration and debate.

However, I am in a minority position in relation to Recommendation 9 which is supported by Messrs Gunn, Harper, Santoro, Schwarten and Mrs Woodgate.

I am therefore dissenting on Recommendation 9 with Ms Edmond.

For the record and to avoid confusion, I point out that the majority of the Committee which supports recommendations 1 to 8 consists of Mrs Woodgate, Ms Edmond, Mr Schwarten and myself.

As Chairman, it has been naturally difficult to dissent on Recommendation 9. Indeed, as Chairman, it is difficult to dissent on any recommendation.

Nevertheless, I stress that my dissenting view is in no way a reflection on any Committee member. However, I feel sufficiently strongly on Recommendation 9 to put forward this dissenting view.

The recommendations of the majority of the Committee favouring homosexual law reform will inevitably and unavoidably be controversial since the issue is a very complex and sensitive one.

It is therefore only natural that there would be a wide range of views on a number of issues involving changes to the law.

My opposition to Recommendation 9 is very simple. I do not support a Preamble which could detract from the Legislation itself.

As a lawyer, it is my strong view that the Legislation should stand on its own and not be subject to possible reinterpretation by virtue of the contents of a Preamble expressing an opinion inconsistent with the intent and wording of the Legislation. The law seems to be fairly clear. If the Legislation is unambiguous and clear then it is interpreted accordingly by the Courts and the Preamble in those circumstances is irrelevant in terms of its legal implication.

However, if there is any ambiguity in relation to the interpretation of the Legislation then the Courts will consider the Legislation as a whole including the Preamble.

It is the responsibility of the legal profession to be competent word-smiths and it would

therefore be naive, in my view, to believe that possible ambiguities or interpretations would not be argued under certain circumstances.

In my view once a decision is reached to change a particular area of the law, such as homosexual law reform, then I believe that that should not be impeded in any way by a contrary view expressed in a Preamble.

In essence, my view is, if Parliament believes that the law on homosexuality should be changed, then it should be changed in an unencumbered way and not affected by a conflicting Preamble. Based on interstate experience such a Preamble would most likely be inconsistent with the content of the Legislation and this could cause significant legal problems at a later date.

As a civil libertarian, it is also my strong view that such a Preamble would be offensive, totally unnecessary and counter-productive.

The Western Australian Preamble which was examined in detail was quite frankly offensive to a significant section of the community and was counter-productive in areas such as AIDS Education and fighting the spread of AIDS.

The Western Australian Preamble was inserted after a display of pragmatic political considerations and by virtue of the fact that the Bill was a private members bill which had to deal with a hostile Upper House.

The Victorian Preamble is also totally unacceptable for any proposed Queensland legislation. It was a Preamble in front of Legislation which related to homosexual and heterosexual offences and not just homosexual matters. Putting a similar Preamble in front of Queensland legislation would then specifically refer to one section of the community and would have a totally different impact than the Victorian Preamble.

In summary, the key to this issue falls in to three parts - one, legal considerations, two basic civil libertarian concerns and thirdly the need to stop the spread of AIDS.

In saying that, I'm not suggesting that the spread of AIDS is simply the responsibility of the homosexual community, because it is not.

However, as the father of three young children I am determined to do everything within my power to ensure that by the time my children reach their teenage years everything is done over the years to wipe out AIDS.

This can only be done by openness, honesty and frankness in dealing with the AIDS issue and how to stop its spread.

Following the Committee's Public Hearings, I was convinced that self-esteem is absolutely crucial to ensure that those members of the homosexual community at risk will make sure that one, they are AIDS tested and secondly they will be encouraged to practice safe-sex practices.

I think it is quite clearly logical that if self-esteem is encouraged then the consequences of that

will be the practising of safe-sex.

This will have a clear and direct impact not only on reducing the spread of AIDS but the eventual elimination of the disease.

An offensive Preamble would directly impact on the development of self esteem and therefore reduce the effectiveness of safe sex education campaigns and the anti-AIDS campaigns in general.

When the world is confronted by one of the greatest health risks in recent decades we need openness and honesty to deal with that threat so that future generations will be safe-guarded.

I am therefore prepared to not only advocate changes to the law relating to homosexuality but to take the strongest possible position in ensuring that with changes to the law we also create a circumstance where the homosexual community is treated in such a way that it will be encouraged to continue safe-sex practices in the fight against AIDS.

I am also of the view that even those in our community who oppose homosexual law reform would prefer honesty and frankness when it comes to the law and not changes to the law hidden behind an inconsistent Preamble.

I believe that public health is much more important than politics. I appreciate that it would have been much easier to support the majority view on this issue but I feel strongly on the point.

Accordingly I urge the Government and the Parliament to disregard Recommendation

9 and to tackle the issue of AIDS head-on.

Without repeating the evidence here, it is very clear to me that the objective factual material put before the Public Hearings on homosexual law reform and the written submissions put before the Committee oppose a Preamble for the reasons I have outlined above.

Indeed the evidence put before the Committee, particularly on the issue of the Preamble and self-esteem, speaks for itself. It indeed supports my position.

In particular, I make reference to the evidence given by the following at the public hearings and in written submissions:

1. Dr Cynthia Gallois, Psychologist, Senior Lecturer in the Psychology Department, University of Queensland.

2. Professor Beverley Raphael, Professor of Psychiatry at the University of Queensland and Director of the National Centre for HIV research.

3. Dr Jim Rodney, Psychiatrist, Chairman elect of the Australian and New Zealand College of Psychiatrists.

4. Acting Associate Professor of Law at QUT, Mr Phillip Tahmindjis.

5. Elizabeth Reid, Director of the Division for Woman and Development of the United Nations Development Program in New York and Advisor to the Administrator on the AIDS

epidemic and development.

6. Queensland Council for Civil Liberties.

7. Mr WA Lee, former Reader in Law at the University of Queensland and a Part-Time Commissioner for Law Reform.

Those members who oppose the Legislation or feel strongly about any aspect of it have an opportunity to put their views on the public record when the Bill changing the law comes before the House. In my view this is the appropriate way to express a Member's view. This should not be done in a Preamble to Legislation recommended in this Report.

**Peter Beattie MLA**

**STATEMENT OF DISAGREEMENT**

**by**

**MS W EDMOND MLA**

**in relation to Recommendation 9**

An area of concern from both health and social perspectives is the poor self image amongst homosexual men, which manifests itself in a variety of ways, eg. high suicide rates of young homosexuals; stress; depression; furtive, anonymous sexual patterns (beats) and casual sex.

It seems to be clearly recognised that these problems stem from low self-esteem exacerbated by the present criminal laws. (Refer to written and oral evidence given by Dr Cynthia Gallois, Professor Beverley Raphael and Dr Jim Rodney.)

To combat these concerns and the major community problem of AIDS, society needs the cooperation and confidence of the homosexual community in working towards long-term behavioural modification programmes, which rely on raising homosexual self-esteem.

To achieve this, changing of the criminal code with respect to homosexual acts needs to be done in a way that is non-judgmental, without a high moralistic stance and in the spirit of equality and non-discrimination. These changes should be in keeping with national and international codes.

Parliament should not attempt to take over the role of moral custodian performed already very well by the churches, especially as there is such a diversity of opinion over this issue within the many religious organisations.

There is no legal or legislative need for a preamble. The Criminal Code currently provides protection for children and non-consenting adults and there can be no argument against this protection.

Any preamble that is not totally neutral implies that, in this special case of homosexuality, a list of essential measures are needed to accommodate the repealing of the law.

This in no way implies that homosexual activity should be promoted or encouraged but that a neutral stance should be taken on sexual orientation.

**Wendy Edmond MLA**

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