

## Australia: nine jurisdictions, one long struggle

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As a medium-sized country overshadowed in the Anglophone world that it largely inhabits, Australia rarely looms large in international histories. This is a pity, because it has much to tell us about the times that Australians have lived through. It is especially true in relation to gay/lesbian/queer issues where the struggle for equality has been fought out over a long period, in a variety of social and historical contexts, and with striking success. With the exception of same-sex marriage, the struggle for legal equality in Australia is now pretty much complete. The Australian story began in the 1960s, with the introduction of homosexual law reform as an element of a broader suite of demands put together as part of its modernisation and liberalisation, through the emergence of a gay and lesbian rights movement, which profoundly reshaped the issue, and through a period of challenge to gay rights from AIDS and a new homophobia. It is a tale of activists adapting to changing circumstances, responding to new opportunities and crafting tactics and strategies. Such tactics have included the globally groundbreaking invocation of human rights instruments via the United Nations to claim a legal right to privacy, in relation to ‘sexual orientation’, in the case of *Toonen v. Australia* (United Nations Human Rights Committee 1994). The story thus has a continuing relevance well beyond Australia’s shores and well beyond the struggle for LGBTBI equality.

In this chapter the focus is on the decriminalisation of sex between men in Australia. There are, it is true, problems with this. It reflects a context in which sex between women has never been criminalised, and therefore yields a narrative primarily concerning men. It pushes into the shadows the remarkably diverse range of issues that might also be examined under the banner of ‘law reform’ – anti-discrimination laws, age of consent, vilification and hate speech, gay and lesbian families (including parenting, de facto/common law relationships and marriage), access to reproductive technologies and so on. This approach also sets aside consideration of the diverse populations who came to be associated with the lesbian and gay community and its issues via quite strikingly different processes of affiliation – bisexuals, transsexuals, transgender and intersex people.

There are minority racially-defined and ethnic populations to be considered, including, in the British settler states (those parts of the empire settled and populated by Britons and their descendants, rather than merely governed by them), Indigenous peoples and their particular sexual and gender categories: for example the growing visibility of groups of transpeople including sistergirls (see Queensland Association for Healthy Communities 2008).

If attention to this remarkable breadth of issues has been sacrificed here to a focus on decriminalisation, this is not unreasonable. The struggle for decriminalisation has a central historical importance for understanding wider struggles for equality. But it also provides a focus that has great value in helping us to understand how social change happens over time. The story of decriminalisation told here develops in stages across nine jurisdictions: the six federal states of South Australia, Victoria, New South Wales, Queensland, Western Australia, Tasmania, and the two territories of Australian Capital Territory and Northern Territory outside states, all within the overarching federal sphere of Australia's 'Commonwealth Government' – and the story would be longer still if extended to cover island territories. The struggles in states and territories over 25 years, which will be discussed chronologically, offer a remarkable case study of the relationships between structure and agency and between institutions and activists, and of how these come together in processes of social, political and cultural change. It is by a close study of this unfolding drama that we can see these relationships at their clearest. This is not, of course, the only way that this history might be understood. In their introduction to *The Lesbian and Gay Movement and the State*, Paternotte et al. (2011) explore some of the methodologies that might be deployed, although in the chapter on Australia, which surveys and analyses the broad developments of recent years with a very good bibliography, Johnson and her colleagues adopt the same historical approach focussed upon social movement activism which I employ here (Johnson et al. 2011). There is a broad-based survey and a discussion of many of the issues in Maddison and Partridge (2007) as well.

This account draws heavily upon my *Living Out Loud* (Willett 2000) where the history of lesbian and gay activism is located within a social movement for liberation and equality via social transformation. I have, accordingly, referenced this chapter somewhat lightly and would refer readers to the more detailed account for more in-depth sources. The account relies heavily, too, on Graham Carbery's brief, but well-researched study of decriminalisation in the states and territories, which has a convenient table of legislation (Carbery 2010).

### **From colonies to the 1950s**

In the settler colonies of Australia, British laws on buggery arrived with the Empire (for this and the following, see McRae 1978). In 1788, the first settlement at Sydney Cove in New South Wales was founded upon British laws, as were the later colonies of Western Australia (1829) and South Australia

(1836). As New South Wales, the mother-colony on the east coast, was carved up, the daughter-colonies inherited the laws as they stood at the time of separation (Van Diemen's Land/Tasmania (1825), Victoria (1851), Queensland (1859), the Australian Capital Territory (1911)). The steady unfolding of self-government in the colonies over the middle decades of the 19th century left them increasingly free to follow their own paths on matters of sex, morals and public decency. But, in fact, they tended to follow the lead of the Westminster parliament in London, albeit at their own pace and with occasional minor variations. Like England, New South Wales stopped executing sodomites in the mid 1830s while retaining the death penalty on the books until 1861. Van Diemen's Land (the earliest name for the colony of Tasmania) continued with its executions until 1863, at which point the legislature followed these changes. England's 1885 law criminalising gross indecency was adopted in the Australian colonies and states between 1892 and 1919. New Zealand followed a similar trajectory, while moving decisively away from the other Australasian colonies towards national independence (Guy 2002).

Many decades later, when the Wolfenden committee issued its report in 1957 calling for the decriminalisation of homosexual acts between consenting adults in private (Committee on Homosexual Offences and Prostitution 1957), this was noticed in Australia, although press reports and politicians' responses were rather more uniformly hostile to the suggestion of reform than in Britain (French 1986, pp. 27–8). The history of the one serious effort to emulate the work of the London-based Homosexual Law Reform Society is an indication of how little was possible in the late 1950s.

In late 1958, Laurence Collinson, a writer and a well-known member of Melbourne's left-wing bohemian literary world, and himself a homosexual, inspired by reports in the British magazines which circulated in Australia, attempted to set up a version of England's Homosexual Law Reform Society (HLRS) (Willett 2000, pp. 15–17). His papers contain correspondence with Andrew Hallidie-Smith, secretary of the HLRS, as well as notes outlining the value of such an organisation, the possibility of setting up executive and general committees, the need for an honorary lawyer and methods of raising finance. In November 1959, Hallidie-Smith advised that he had sent 50 copies of the HLRS pamphlet *Questions and Answers* (Albany Trust n.d.) as well as 'some other literature', but it is not clear that these were received or distributed.

The failure of this effort is not surprising. The idea of a lobby group on the model of the HLRS was reasonable and this is certainly what Hallidie-Smith recommended. But Australia had not in fact experienced any public debate about homosexuality in the way that Britain had during the scandals of the early 1950s and in the aftermath of the Wolfenden report being released (Committee on Homosexual Offences and Prostitution 1957). Nor was there any visible pool of liberal supporters such as had been generated in various parts of Britain (Higgins 1996).

When, in the 1960s, homosexuality did come on to the public agenda in Australia, it was in a rather surprising way. Quite suddenly, it was being talked about in terms of the need to repeal anti-homosexual laws and mitigate anti-homosexual attitudes. These views were part of a new, modernising, liberal current in Australian political life which was arguing for a wide-ranging reform of society (Horne 1980). Within this broader debate and discussion a new understanding of homosexuality was forged. The notion that homosexuals and homosexuality were threats to society was increasingly rejected. Far from the shadowy, dangerous and repulsive figure of the 1950s, the homosexual was coming to be seen as someone to be pitied: homosexuality, like blindness and congenital heart disease, was an abnormality which must be treated accordingly, opined one sympathiser (Anon. 1965).

But this new liberal attitude did not confine itself to a critique of existing ideas. Rather, it set out to construct an alternative basis for social policy. Essentially this revolved around the notion that sexual behaviour was an individual, rather than a social, 'problem'; that where no-one was hurt or coerced, and the acts took place in private, sex ought to be of no concern to the state. The notion of the consenting adult in private is crucial here, a slogan and a set of ideas that came directly from the Wolfenden report and were enacted in England and Wales via the Sexual Offences Act 1967 (Waites this volume). In part, to be sure, this notion embodies a defensive posture: 'consenting' stands against the notion of homosexual-as-predator; 'adult' against the homosexual-as-child-seducer; 'private' against the homosexual-as-public-nuisance. But it also contains within it a decisive shift in how homosexuality should be perceived – as a matter for individual conscience, rather than public policy. Increasingly, this liberal thinking started to be reflected among university students and the student press, in the legal profession and even in the mainstream Christian churches (Willett 1996).

If there is a decisive moment in the rise of the new modernising liberalism to dominance in Australian politics and society, it came with the reform and modernisation of the Australian Labor Party (ALP), spearheaded by its young new leader, Gough Whitlam, who took up the ideas with alacrity. In his rewriting of the ALP's programme, homosexuality was not directly addressed. But the success of the new liberals' project for the reform, renewal and renovation of Australian society advanced the cause of homosexual law reform anyway. By its association with the whole cluster of themes to do with modernising Australia – throwing off old prejudices, deepening personal responsibility, enhancing personal privacy, building a tolerant society, dismantling the influence of religious attitudes, and so on – the decriminalisation and toleration of homosexuality rode into the mainstream on the coat-tails of a broader movement. In September 1970, Whitlam expressed his personal support for homosexual law reform, declaring that private moral decisions should be separated from public political attitudes and calling for a conscience

vote in the parliament (MacCallum 1970). Observing the success of Whitlam's programmatic reforms, others started to speak up. Tom Hughes (1970), the federal Liberal government's attorney general, raised the possibility of reform and, in the Australian capital city of Canberra, the *Canberra Times* (1970) took the opportunity to call for the decriminalisation of homosexual acts. This is where our story of successive conflicts in the territories and states begins.

### **The Australian Capital Territory**

It was in this context of emerging suggestions of reform that 1969 saw the emergence of the Homosexual Law Reform Society of the Australian Capital Territory (ACT HLRS), the earliest, largest and most public attempt by liberals to decriminalise homosexual acts (Willett 2011). It was not an organisation of homosexuals; nor was it particularly concerned with issues other than decriminalisation. Both of these factors mark it off from the soon-to-appear gay movement, and it makes sense to think of the ACT HLRS as being part of that phase of reform politics which centred on a notion of civil liberties and the activism of civil libertarians (Grieve 1995). The ACT HLRS drew upon the by now well-established acceptance within liberal humanist circles of an anti-criminalisation stance (Willett 1996) and it embodied this in the Ordinance it drafted for the minister of the interior's consideration.

The ACT, as a 'territory' in which Canberra is situated rather than a 'state', has powers delegated from the Australian Government rather than by constitutional right, although it has had full internal self-government since 1988. Before the process of introducing self-government started in 1974, the Australian Capital Territory was governed under New South Wales laws inherited at the time of its establishment in 1911, as amended periodically by ordinances proclaimed by the governor general on the advice of his ministers. The HLRS's draft law, guided by the Sexual Offences Act of 1967 applying in England and Wales, relied upon the notion of the consenting adult in private, but with two important differences: the age of consent was to be 18 rather than 21; and 'private' was not to be interpreted in the narrow sense of the presence of not more than two people. Penalties for remaining offences such as soliciting were reduced and the draft Ordinance required that courts seek a medical opinion before passing any sentence of imprisonment upon a homosexual (HLRS 1969). The ACT HLRS commissioned an opinion poll which found that 68 per cent of those interviewed favoured decriminalisation; it published a newsletter and its members participated actively in public debates. Among the targets of its lobbying were the ACT Law Society, clergymen, members of the medical profession and judges. Overwhelmingly, the response from these quarters was supportive of change.

Despite all this activity, homosexual law reform was not achieved in the ACT until 1976 – some years after the Society itself had ceased to exist and

several years after public opinion and professional attitudes had been reformed. It is often assumed that law reform is a simpler task than social and cultural transformation. Certainly, gay and lesbian activists at the time thought this was the case. In September 1970, James Grieve, one of the founders of the ACT HLRS, had written to the founders of the Campaign Against Moral Persecution (CAMP), the first national gay rights organisation, noting that CAMP's goals were 'much wider than law reform', including as they did the changing of public opinion, professional attitudes and so on. Grieve wished them well and declared that CAMP's task would be 'a much harder job' than that of the HLRS, adding that 'no doubt we [the HLRS] shall succeed long before you do' (Ware and Poll 1970; Grieve 1970). But actually, law reform has its own peculiar constraints. The 'public', whose opinions movement activists were keen to change, was a broad and diverse category of people who offered numerous targets for activists. Similarly, medical or religious opinion is held and determined by large, although smaller, numbers of people who are free to debate and change their ideas, usually by incremental processes. Legislators, on the other hand, are a relatively small, tight-knit and somewhat cautious group, and laws can only be changed if a majority of legislators can be induced to openly and publicly commit themselves to a particular policy.

But the ACT HLRS had put homosexual law reform firmly on the agenda and the election of the ALP to federal government in December 1972 promised much. There were early positive signs. On 18 October 1973, the House of Representatives endorsed, by 60 votes to 40, a motion reading: 'That in the opinion of this House homosexual acts between consenting adults in private should not be subject to the criminal law' (Willett 2000). The vote found odd bedfellows. A significant bloc of opposition to the motion came from the right-wing faction of the ALP, reflecting the conservative Catholicism of this group. Among those voting against the motion was a young Paul Keating, who, as prime minister some 20 years later, was to play a very positive role in relation to the gay and lesbian rights agenda. From the other side of politics, a number of conservatives unexpectedly voted for the motion. Doug Anthony, the leader of the Country Party, was one of these. The Country Party, later renamed the National Party, represented rural and regional Australia and could generally be relied upon to uphold the conservative social values of its electorate. Anthony, asked afterwards about his surprising support for the motion, is said to have laughingly declared that, 'You Labor boys think you're so trendy. But what you don't realise is that a lot of us have been to boarding school!' (Blazey 1994, p. 59).

Even now law reform was not in place – the motion had been an expression of opinion only. The new ACT Legislative Assembly turned its attention to the issue in December 1974 but the final bill for reform was only passed in July 1975, and when the federal ALP government fell in November of that year, the Ordinance had still not been signed by the attorney general. In mid 1976

the whole process began all over again under a new Liberal attorney general who had not been happy with the earlier version (Watson 1976a; 1976b). The decriminalisation of male homosexual acts in the ACT finally took place in November 1976 (Australian Capital Territory 1976).

By this time, a new actor arrived on the Australian political stage – the gay and lesbian movement. This was part of a much larger political transformation that began with the movement against the Vietnam War and the eruption of struggles by women, students and Indigenous people, and around issues such as the environment and peace; struggles that radically reshaped Australian society and continue to do so today. The Campaign Against Moral Persecution (CAMP) was founded in Sydney in mid 1970 and by the end of the year it was a national organisation with 1,500 members and branches in every state capital city and on most university campuses (Willett 2000, pp. 33–52). Over the coming years, CAMP continued to play an important role in gay and lesbian politics, joined by a plethora of other organisations. What all these had in common was a determination to change society – to transform by political activism of one sort or another the laws, professional understandings and social attitudes that disadvantaged gay men and lesbians. In later years bisexuals, transgender and intersex people would bring their own insights and demands to this debate. Alongside the modernising liberalism of the 1960s, there was now a new assertive movement, associated with an emerging community, that wanted more than tolerance. These two streams of thought were to profoundly shape the politics of homosexual law reform, and the politics of many other issues, for decades to come.

### **South Australia**

When early gay rights activists turned their minds to the question of decriminalisation, there were a number of candidates for the jurisdiction most likely to lead off. The ACT, where the issue was first raised in 1969, was one. So, too, was Western Australia, where the state branch of the ALP had adopted reform as party policy in 1970. But it was South Australia, where Don Dunstan was leading the state ALP firmly in a liberal direction, just as Whitlam was doing at the national level, that claimed the prize – twice (Reeves 1994; Cowan and Reeves 1998; Hodge 2011).

As early as the mid 1960s, according to his own account, Don Dunstan had been quietly pushing for homosexual law reform as part of a broader programme of change and modernisation. He found himself blocked by caucus and it was only when he was elected as premier in his own right in 1970 that he was able to put the wheels in motion (Dunstan 1981). In December 1971 his government announced the establishment of a broad inquiry into social questions under Justice Roma Mitchell. Homosexual and drug law reform were included but there was no timeframe for their consideration.

This did not unduly perturb the local branch of the CAMP. As a relatively young organisation, with its founding meeting being held only in October 1971, its early efforts were appropriately modest. It saw law reform as very much a long-term project to which its contribution would be, initially at least, largely educative. To this end it set about meeting with opinion-makers such as clergy and medical professionals.

This careful approach on the part of both the Dunstan government and CAMP was thrown off by the murder of University of Adelaide law lecturer George Duncan on 10 May 1972. Duncan had been doing the beat – cruising for sex – on Adelaide’s Torrens River bank and his death was widely believed to have been a result of anti-gay violence by off-duty police officers. The national furore that resulted threw everyone’s careful plans for homosexual law reform into disarray. Suddenly the oppression of homosexuals was big news and the law-reform genie was out of the bottle. CAMP and civil libertarians and the Adelaide *Advertiser* newspaper declared that the murder showed the need for law reform. Murray Hill, a little-known Liberal Country League (LCL) member of the Legislative Council, the upper House in the state’s bicameral Parliament, announced that he intended to introduce a Private Member’s Bill to decriminalise homosexuality. Forced to respond, both major parties declared that they would allow their members a free vote, though it seems clear that the ALP had decided to seize the moment and set out to ensure that the bill was passed (Hodge 2011). The Legislative Council was heavily weighted towards rural and conservative interests and no-one put the numbers of supporters there at much better than six or seven.

Hill’s bill was far from ideal. CAMP objected to the age of consent being set at 21, to the very narrow definition of ‘in private’ (in the presence of not more than two people; a law that did not apply, for example, to heterosexual sexual encounters) and to provisions on procuring that made it impossible for one man to proposition another under virtually any circumstances. CAMP argued with Hill on all of these to no avail. And in the end, the final outcome was even worse than Hill intended. In the upper house the bill was amended beyond recognition. No longer did it decriminalise homosexual acts between consenting adults in private. Now, all it did was to make the conditions under which sex took place – two men aged over 21, in a consensual act, in the presence of no other person – a defence in court. That is, homosexual acts were still illegal, arrests could still be made, but where the conditions were met and were proved in court, no conviction would be recorded. Attempts in the lower house to reverse these changes failed and finally ALP members in the upper house reluctantly allowed the bill to pass into law. On 18 October 1972, South Australia became the first place in Australia where homosexual acts were, if not exactly legal, then no longer entirely illegal either (Reeves 1994).

In March 1973, the newly elected ALP member Peter Duncan (no relation to George) immediately flagged his intention to introduce a law to effect the



complete decriminalisation of homosexual acts and an equal age of consent. It took two years, and another election, but finally in 1975 with the numbers now decisively in favour of reform – with the press and the archbishop of Adelaide, the Council of Civil Liberties and the Australian Psychological Association all publicly voicing their support – the bill finally passed through parliament (South Australia 1975; Cowan and Reeves 1998). For all the failures, delays and setbacks, South Australia was still the first (and second) jurisdiction in Australia to enact real homosexual law reform.

In some ways, the surprising fact about the 1972 law reform in South Australia is not that it was as bad as it was; the surprise is that it was not simply voted down by those who had doubts about decriminalisation. It is clear evidence that liberal ideas, such had been argued since at least the mid 1960s, had eroded the arguments for the criminal status of homosexual acts and the confidence of those that held them.

## Victoria

In South Australia and the ACT, decriminalisation owed more to liberal values than to the demands of gay activists. But the emergence of a radical gay liberation movement in many Western societies, including Australia from the end of the 1960s, distinctively calling for equality and liberation, increasingly had an impact (Altman 1971). When, in the late 1970s, homosexual law reform suddenly came back on to the political agenda, the presence of gay rights activism was to shape the processes of reform very strongly.

In the early days of the movement, law reform had not loomed large in Victoria. Although the Humanist Society had published the first extended argument for homosexual law reform in its pamphlet *The Homosexual and the Law – A Humanist View* in 1970 (Humanist Society 1970), given the conservative nature of the Liberal government, the likelihood of change was considered small. It is not surprising that neither the Humanists nor Society Five, the Victorian branch of the CAMP, seem to have devoted much energy to the question. But by 1973, forces within both the ALP and the Liberal Party, mostly the youth wings, were openly canvassing the possibility of reform and leaders were responding with cautious support. However, there was no law reform group as such until, in January 1976, a meeting of some 30 activists from six different groups met and founded the Homosexual Electoral Lobby (HEL), later the Homosexual Law Reform Coalition (HLRC), which undertook some lobbying, education work and the drafting of a proposed decriminalisation law (Willett 2000, pp. 148–56).

But just as the Duncan murder had transformed the debate in South Australia, so too in Victoria did police activities launch the state on to the road to reform. In November and December 1976, the phone services operated by Gay Liberation and Society Five received a flurry of calls from men who had

been arrested while doing the beat. The *Age* reported that police had launched a major entrapment exercise, opting to 'go gay to lure homosexuals'; observing gay men in the ti-tree bushes lining the beaches through binoculars, in order to learn the mannerisms, especially the 'particular walk', by which gay men identified each other (Rentsch and Carmen 1977). Politicians, community groups and gay organisations were outraged. Lawyers offered support.

In April 1977, Liberal MPs met to discuss the possibility of changing the laws, and seem to have agreed. The attorney general made it clear in meetings with HLRC members that there would be no equal age of consent and the laws against 'soliciting for homosexual purposes' would remain untouched. It was expected that the bill would be presented within the next three weeks. In fact, the government found itself distracted by an unrelated scandal and it became clear that there would be no reform before 1978. This delay provided the HLRC with a much-needed opportunity to build support for a better law. In September, a public meeting called at short notice attracted some 100 people and provided the spark that mobilised many into action.

It was a period of intense activity for the HLRC, which never numbered more than a dozen or so at its meetings, but which was nonetheless starting to have a major influence on the terms of the debate. Mostly, the work of the HLRC was sheer hard slog, the 'painstaking collection of evidence and details, and boring correspondence and conversation with decision-makers and those who influence them', as members of the group later put it (Gardiner and Talbot 1981). Members met frequently with Haddon Storey, the attorney general, to explore issues, answer questions, soothe fears. When, in mid 1977, Storey expressed doubts about whether the public would support law reform on the basis of equality, the group persuaded a polling company to conduct a survey to test the point. The strong support for an equal age of consent that was revealed was a major factor in shifting the terms of the discussion.

When the law was passed in late 1980, it embodied equality in the age of consent, and amendments to the soliciting laws – all introduced as a government bill, rather than as a Private Member's Bill, making Victoria the first state to take this route (Victoria 1980). Victoria's reform was widely spoken of at the time as the best in the English-speaking world.

### **New South Wales**

In Victoria, the government had put law reform on to the agenda, but without the gay movement's participation the final product would have been very much less satisfactory. In New South Wales (NSW), on the other hand, it was the movement that made the running, leaving the ALP government scrambling to catch up (Willett 2000, pp. 156–65; McLachlan 1998).

The Gay Rights Lobby (GRL) was founded at a public meeting in Sydney in February 1981. It recognised the need for the 'juggling of different

tactics at different times' and included lobbying, a gay rights petition, media management for positive coverage, and education of both opinion-makers and the person in the street (Willett 2000, p. 158). Efforts were to be made to tap into grass-roots and clerical support within the Christian churches and from NSW gay organisations outside Sydney. Support from within the gay sub-culture and the rest of the gay movement was essential, and so, despite its name, the GRL engaged as much in campaigning and agitating within the gay scene as in behind-the-scenes lobbying.

Opportunities for campaigning around the law presented themselves very quickly. In March 1981, the government amended the state's rape laws. It was discovered that, while consenting homosexual acts would continue to attract a 14-year jail sentence, a new sex-neutral offence of 'sexual intercourse without consent' meant that homosexual *rape* would attract a penalty of only seven years! An attempt to use this anomaly as a reason to amend the laws on buggery was quickly quashed by the ALP's powerbrokers, but the issue resurfaced late in 1981 after the state election gave the ALP control of both houses of parliament. Over a four-month period there were no fewer than four attempts to amend the laws on homosexuality. All of them failed (Johnson 1981).

And then, over several months in 1983, the NSW police launched a series of raids on gay sex venues. Once again, as in South Australia and Victoria, police homophobia fed directly into arguments for law reform. In the earlier NSW debates, those opposed to reform had often argued that anti-gay laws were so rarely enforced that change was unnecessary. Here, in the recurring raids on the sex clubs and saunas, was clear evidence that this was not the case. But the most important impact was in prompting large numbers of previously apolitical gay men into action and in bringing them into contact with gay activists for the first time. Meetings of up to 1,000 people voted to condemn the government and the police. Hundreds marched in protest. Many of them continued their commitment by participating in the law reform campaign, and even those who did not at least had some idea now of what it was that activists were on about.

Immediately after the 1984 state election, which again returned an ALP government, the GRL wrote to all MPs, warning them that the issue of homosexual law reform was likely to arise and enclosing its two publications, *Homosexual Law Reform: Questions and Answers* (Johnston 1984) and *Homosexuality: Myths and Reality* (Simes and Johnston 1982), as well as a draft law reform bill. Shortly afterwards, a leaflet directed at the gay community on how to lobby local MPs was being circulated. The GRL was gearing up to relaunch the fight.

Suddenly, Premier Neville Wran announced that he intended to introduce a bill to decriminalise sexual acts between men aged 18 years or older. Wran's intervention virtually guaranteed the passage of the bill, few doubting that his credibility as party leader and Premier was on the line. But, perhaps more than

anything, the fact that the issue had dragged on for so long made it imperative that it be settled once and for all. Finally, after a last ditch effort to get the age of consent reduced to 16 failed, the bill passed remarkably easily through parliament (New South Wales 1984).

### **Northern Territory**

Decriminalisation was also achieved in the Northern Territory in 1984. Geographically comparable in size to the six federal states, the Northern Territory has a different constitutional status like the previously discussed ACT and various island territories. The Territory is self-governing under federal legislation passed in 1978. Decriminalisation in the Northern Territory was enacted by the Liberal Country Party via government legislation. Parliament's structure in the Territory, with only one chamber known as the Legislative Council, made legislative change easier to achieve than in some of the states.

As the changes have been discussed elsewhere (Carbery 2010), they will not be discussed at length here, partly because the struggles involved were less protracted than elsewhere, and partly since they fall in the middle period of the overall decriminalisation struggle, so reveal little about the extremes of the spectrum of changing social attitudes. However the most significant point to note from the Northern Territory context is the use of government legislation, as in Victoria. This differed from previous use of Private Members' Bills in other states and meant less protracted and difficult debates. It is suggestive of the extent of changing social and political attitudes, illustrating that members of a conservative political party were able to confidently adopt a shared position on the issue. The case suggests the benefit which social movements gain when a governing party becomes clearly aligned to their cause, in a context where an executive has significant structural power relative to a legislature.

### **Queensland**

By the late 1980s, there was an air of inevitability about homosexual law reform. Public opinion, which had been in advance of politicians on this question since the early 1970s, had firmed up. Actual change, of varying quality, had been implemented in a majority of states and territories without the sky falling in. Political parties showed that they were not as fearful of the issue as previously. The Liberals in Victoria and the Liberal Country Party in the Northern Territory had even introduced change as government policy.

The only state parliament which had never discussed homosexual law reform was Queensland's (Willett 2000, pp. 219–24; Carbery 2010). The National Party, which governed thanks to a distortion of the electoral system giving a disproportionately large number of seats to the rural areas of the state, had been left untouched by the liberalism of the 1960s and 1970s and there was no chance of decriminalisation being debated, much less of it being permitted

to pass. On the Labor side of politics, on the other hand, there was strong support. As early as 1981, the party had committed itself to decriminalisation and anti-discrimination laws. It also embraced equal rights for gay couples in areas such as tax, probate, property ownership and transfer, pensions and superannuation.

But the Queensland Association for Gay Law Reform (QAGLR), the first gay community-based law reform group, was not set up until 1988. And then it was in the small northern city of Cairns. The group was actively supported by the Queensland AIDS Council's regional office, which had already become the *de facto* voice of Queensland homosexuals, speaking out against police entrapment and various acts of discrimination. By March 1989, a branch was established in the state capital, Brisbane. Events were moving fast, and the group had plenty to do.

The National Party government was visibly fraying as evidence of corruption and mismanagement was revealed and, as a result, the whole political climate started to shift. On the one hand, the Nationals retreated to an ever-more strident right-wing populism, targeting gays in particular. On the other, it was increasingly likely that the ALP might actually win government in the 1989 state election and that reformers needed to move, even if rather cautiously. In November a 'gay summit' or round table was organised at Queensland University to which all the groups – political, social, religious, counselling, sporting – were invited, reflecting a 'growing recognition that the times make it imperative for the community to come together' (Galbraith 1989). These gatherings were to become regular events at which activists debated developments and decided on co-ordinated approaches to issues.

When Labor was in fact elected in the December 1989 election, it immediately launched an inquiry by the Parliamentary Criminal Justice Committee (CJC) into the issue of decriminalisation. Activists set out about mobilising their community and talking to the new government. The election-time round tables were continued and ministers were lobbied relentlessly. The new attorney general met with QAGLR representatives a mere two weeks after the election and there were some good signs. As a token of good faith, the government repealed the Nationals' 1985 law which had made it illegal to serve homosexuals in hotels (for the original Act see Queensland 1985).

When the CJC reported, it was unequivocal in its support for decriminalisation and for an equal age of consent of 16 (Criminal Justice Commission 1990). It urged, too, that offensive behaviour be defined in terms that applied equally to heterosexual and homosexual acts. Sexual offences, public decency and child protection laws should, it said, all be gender neutral. Widespread support was immediate. Peter Beattie, who had headed the CJC inquiry, spoke out strongly in favour of its recommendations, arguing that 'If we [the government] face up to the tough decisions and deal with them the way we should, that is openly and honestly, we will win the community's support

and respect' (Anon. 1990). He was joined by numerous public figures, who wrote to the government urging its acceptance. Among them were Tony Lee, who had delivered a paper on law reform to CAMP Queensland in 1970; John Gorton, who had moved the 1973 federal parliament motion; Don Dunstan, under whose government South Australia had led off on the whole issue in 1972 and 1975; and Elizabeth Reid, who had been a member of the ACT HLRS. It was as if every person who had ever touched or been touched by the issue in the 1960s and 1970s were rallying for one last push.

By the time the proposals came to Cabinet, there was solid support. A strange little amendment that made anal sex illegal for men and women under the age of 18 was tacked on, and a fairly offensive preamble was permitted, but the results were a foregone conclusion. On 29 November 1990, after a mere five hours of debate, the bill passed through the Legislative Assembly and was proclaimed two weeks later as the Criminal Code and Another Act Amendment Act 1990 (Queensland 1990).

### **Into the 1990s**

Queensland, although a hard-fought thing, had operated with certain advantages. The single-chamber parliament meant that, once the government had made up its mind, there was no risk of amendment by rogue elements in the upper house. The fact that the ALP was in government after 32 years of opposition, imposed a real discipline on party members to demonstrate unity of purpose. The long-standing and intimate association of the far right and moral conservatives with the National Party denied them much influence with the new government. Gay activists, on the other hand, had close links to the ALP, developed over many years.

Western Australia and Tasmania, the last states to decriminalise, were less fortunate. Burdened with two-chamber parliaments and, further, by upper houses that were quite undemocratic in their electoral base, reformers also had to deal with a right-wing backlash that had sunk deep roots in society. In the mid to late 1970s, the Festival of Light (FOL, a movement of conservative Christians) had led anti-gay forces in Australia but, in the late 1980s and early 1990s, its place had been taken by a new grass-roots anti-gay movement; one which differed from the FOL in a number of ways. In the first place, it seems to have developed more or less spontaneously, whereas the FOL was the initiative of leading figures from the upper reaches of the church hierarchy and the professions. Secondly, although the key organisations of this new movement were churches, they were more often the fringe sects rather than the mainstream churches – the Presbyterians, Baptists and Pentecostals, rather than the Anglicans and Catholics. Finally, this new movement seems to have been based primarily in rural and provincial areas. This was especially true in Tasmania – it was in the northern and more rural parts of the state that

hostility to law reform was at its most intense. It is difficult not to see this mobilisation as a precursor of Hansonism, the right-wing populist movement focused around Pauline Hanson that convulsed Australian political life in the last few years of the 1990s. And it provided a pole of attraction for conservative politicians among the National Party and the Liberals, especially when they were freed from the responsibilities of government (as they were in both Western Australia and Tasmania from 1989).

And all this took place in the age of AIDS. In February 1989, the Australian Federation of AIDS Organisations, the peak AIDS organisation in Australia, published a report *AIDS Prevention and Law Reform* (Loff 1989), arguing that the illegality of homosexual acts was hindering the effort to reduce the spread of AIDS. There were obvious ways in which this was true. Men who had sex with men were less likely to report for testing and treatment, or to be honest in reporting on their behaviour, if there was any risk that they might be prosecuted for their admissions. But it was also argued that the law, by stigmatising homosexuality, contributed to low esteem among gay men, encouraging lack of self-respect and self-care and risky behaviour.

One further issue was important. Over the course of the 1980s, the gay rights agenda had widened considerably. One Western Australian member of parliament, who voted for law reform in 1977 and against it in 1984, argued that the issues of the late 1980s were broader than they had been in the past. In 1977, he said, it had been a matter of letting consenting adults do what they wished in private. By the mid to late 1980s, however, 'many more issues were involved, such as the legality of homosexual marriage, a homosexual's right to authorise surgery or medical treatment for his partner and their right to adopt children' (Anon. 1984). He was right in this. As long-time activist David Myers put it in 1984: 'When the religious fundamentalists claim that decriminalisation is the first step towards legitimising homosexuality as a valid lifestyle, they are quite correct. That is our goal' (Myers 1984). Life for politicians had got harder: the easy option of focusing upon the consenting adult in private was fading rapidly and the liberal tide was being challenged by noisy, well-organised minorities from the left and the right.

One other important difference between Queensland compared with Tasmania and Western Australia is that the latter states had long histories of failed law reform attempts, which had led many politicians into cemented oppositional positions. In Tasmania, the issue was floated by politicians in 1973, 1976 and 1977, without success. Western Australia's history was even more tangled, with efforts in 1973–4, 1977, 1983 and 1987.

This, then, was the environment within which Western Australia and Tasmania came to the law reform debate in the late 1980s. Both states experienced significant obstacles to reform – obstacles that were both parliamentary and social. But the ways in which activists chose to respond to these challenges produced remarkably different outcomes. In Tasmania,

although the campaign lasted for ten years, it culminated in total victory, to a considerable extent via a legal ruling which transformed the global human rights regime with respect to sexual orientation and would have continuing implications for states worldwide. The law reform package achieved in Tasmania met all the demands of the movement, laid the grounds for further gains and transformed Tasmanian politics and society in significant ways. In sharp contrast, Western Australia ended up with what may well have been the worst law reform legislation anywhere in the English speaking world.

### **Western Australia**

In Western Australia, a revival of interest in law reform was sparked by formation of an AIDS and law reform task force in May 1988. This grouped several health professionals as well as community leaders, such as the Anglican archbishop, the Moderator of the Uniting Church and the president of the Australian Medical Association (AMA), around the strategy promulgated by AFAO earlier that year (Willett 2000; Carbery 2010). The Gay Law Reform Group of Western Australia (GLRG) was formed soon after, with a steering committee of prominent gay activists such as Graham Douglas, who had been involved in every law reform effort since 1973, and newcomers such as gay newspaper editor Gavin McGurin.

The state attorney general had already made it clear at a meeting with campaigners that the government would require the full support of the gay community before introducing any reform bill and GLRG set out to bring the community together by means of monthly public meetings. Within a short time of its formation, the group was claiming 150 paid-up members and was regularly attracting over 100 people to its public meetings.

The central question for the activists was the age of consent. Although ALP policy set this at 16 (a position re-endorsed by state conference as late as August 1989), the government had made it clear that it would consider nothing lower than 18 years. The movement had to decide whether to take it or leave it. The co-conveners of Breakaway, a gay youth group, spoke up early in an attempt to get GLRG to hold the line: 'As a community,' they said, 'we need to support all its members and this includes the younger members'. Any agreement to an age of consent of 18, would be 'discriminatory and unsupportive of our own' (Reid and Pallott 1980). The June monthly meeting was the scene of 'impassioned debate', with arguments about 'criminality, discrimination, ideology' raging around the two-year gap. The meeting decided that, although the preference was for an age of consent of 16, the campaign would not oppose any bill with one of 18.

The reform bill passed easily through the Assembly but, in November, Peter Foss, a Liberal member of the Legislative Council where the bill would succeed or fail on the conscience votes of Liberals and Nationals, announced



that he was prepared to vote for the bill only on certain conditions. These included an age of consent of 21 and provisions which would make it illegal, as newspaper reports at the time said, to 'promote or encourage homosexual behaviour', particularly in 'any primary or secondary educational institution' (*West Australian* 1989). The GLRG adapted to this surprisingly easily. Having given in on the age of consent of 16, it seemed to have little trouble accepting 21 (*West Australian* 1989). This position was endorsed by a meeting of some 300 people in late November. On 7 December, the bill as amended passed the Assembly (Western Australia 1990). After 25 years of trying, the Western Australian parliament had finally reformed its laws on homosexuality – badly. Laws which had rarely been enforced were struck down, it is true. But large numbers of young gay men were left with a criminalised status. It need not have been this way. As Tasmania was to show, a hard line on the part of gay rights' activists did not necessarily produce defeat.

### **Tasmania**

In 1989 the National AIDS Conference was held in Hobart, and with it the final stage in the campaign for the decriminalisation of sexual acts between men was launched (Willett 2000; Carbery 2010; Morris 1995). The Australian Federation of AIDS Organisations had recently started to draw attention to the relationship between law reform and AIDS prevention, but it was the presence in Tasmania of 1,200 experienced political activists which provided the newly established Tasmanian Gay Law Reform Group (TGLRG) with a new determination to take its issue to the public.

The group set up a weekly stall at the Salamanca Market, a weekend craft market that had become a focus of Hobart's cultural and political life, alongside groups such as the Wilderness Society, the far-left youth group Resistance and other organisations. For a month or so things went smoothly as members collected signatures on their petition. And then, quite suddenly, the local council announced that the TGLRG's presence was offensive and that, if it persisted in turning up, its members would be arrested. By December 1989, 130 people had been carted away and charged. Other market stallholders were arrested for displaying the TGLRG's petition. Observers were arrested. Journalists were among those banned from the site. It was a media and political sensation. Protests and letters of support flooded in from around the world. Carloads of lesbians and gay men came from all over the state, joined by civil libertarians of all stripes. In other Australian cities, gays picketed Tasmanian Tourist Bureau offices. In the end the council caved in entirely, lifting its ban on 10 December.

The TGLRG was immeasurably strengthened over the weeks and months of the Salamanca campaign. Membership grew to 200, many of them politically experienced lesbian feminists whose interest in law reform might

never otherwise have been aroused. The greater involvement of women was reflected in the group changing its name to the Tasmanian Gay and Lesbian Rights Group. Activists acquired years of experience in weeks, thrashing out every possible tactical and strategic question at their Wednesday meetings. Civil libertarians got a crash course in homophobia as rubber-gloved police arrested and abused them.

At the same time, Tasmania experienced something never before seen in Australia – a large-scale, public, popular mobilisation of anti-gay feeling. In mid 1989, in the northern town of Ulverstone, some local councillors, debating a request from the AIDS Council for access to rooms, expressed disgust at the 'arrogant, flagrant types who flaunt their homosexuality with no shame' and declared that safe-sex education was about 'trying to recruit new people to replace the ones they [homosexuals] were losing through death from AIDS' (cited in Morris 1995, p. 32). As their stance was publicised, the councillors became the focal point for a wave of support. In June 1989 some 700 people packed into the Ulverstone community centre to hear speakers denounce the threat to the nation, to its children and families, to civilisation itself, posed by the spread of homosexuality. In Hobart, a week later, a similar crowd listened while the ALP-Greens government was denounced for its pro-gay policy. Around the issue of homosexuality, two movements with radically counterposed sets of demands had emerged.

At the parliamentary level, the half-hearted attempt at decriminalisation by the state ALP-Greens government, announced in 1989, failed in the upper house in December 1991 and the election of a Liberal government in February 1992 sealed the fate of law reform. At which point, the TGLRG embarked on a truly unique strategy – it decided to appeal to the United Nations.

On 25 December 1991, the federal government had ratified that part of the International Covenant on Civil and Political Rights (1976) which allowed an individual, whose civil rights had been infringed by a government, to appeal directly to the United Nations Human Rights Committee (HRC). On the day it came into effect, Nick Toonen, a founding member of the TGLRG, formally lodged a complaint. In 1994, the HRC declared that Tasmania's laws did indeed breach international standards on human rights; in particular, the laws offended against Toonen's right to privacy under Article 17 of the International Covenant (United Nations Human Rights Committee 1994; Henderson 2000). The ruling was globally groundbreaking for interpreting non-discrimination provisions related to 'sex', in Article 26 of the Covenant to encompass 'sexual orientation', a category which was thus introduced into the global human rights law regime associated with the United Nations. The ruling remains a crucial resource which can be used in other states, although it should be noted that the Covenant could only be invoked legally because it had been ratified by the federal government, in a manner which made this possible (Stychin 1998).

The Toonen decision opened the last stage of the long struggle for reform; one marked by a remarkable political mobilisation and polarisation. The appeal to the HRC had reignited anti-gay activism in Tasmania. New organisations were formed – HALO (Homophobic Activists Liberation Organisation) and TasAlert. The groups leafleted MPs and the public, and staged demos and public meetings. But gay people and their supporters were mobilising too. In May, members of the TGLRG confronted Hobart police station with statutory declarations confessing to having engaged in sodomy, daring the police to arrest them. On the mainland, meanwhile, there was a growing determination to do something. Traditional activities, such as picketing of the tourist bureau, were suddenly supplemented by a call for a boycott of Tasmanian products. It is not clear that the economic impact was significant, but as a way for people to express their support nationwide, the boycott was a master stroke.

In September 1994, the federal ALP government, relying upon its rarely-used constitutional power to legislate to meet its international obligations, passed the Human Rights (Sexual Conduct) Act 1994, to provide that consenting sexual conduct between persons over the age of 18 should not be subjected to any 'arbitrary interference' by any law (Australia, 1994). It was modest in the extreme, in fact echoing the 1972 South Australian reform, and it was clear that only a High Court ruling could explicitly apply it to the case of Tasmania. The TGLRG girded its loins for one last fight and appealed. By this time, even the most recalcitrant members of the Tasmanian parliament had had enough. In April 1997, the Liberal government presented a law reform bill. On the night of 1 May 1997, the bill passed (Tasmania 1997). Australia's 25-year struggle for decriminalisation was finally won.

It had been a long and occasionally hard-fought campaign. But, spread as it was over some 40 years (if we take Laurie Collinson's failure in 1958 as the starting point), it was a campaign shaped by evolving social forces – and had, in turn, shaped them. From the early days, when a new liberalism had supplanted a long dark age of conservative homophobia, progress had accelerated with the emergence of a gay and lesbian social movement, the likes of which had never been seen before. Understanding the success of this movement contains lessons that can illuminate processes of social and political change that have shaped the lives of gay people and straight, and the societies in which we live; and not just in Australia. It offers hope and perhaps some guidance for those in so many parts of the world still struggling for these most basic rights.

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