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CARMEL MARY PETERS

CHILDHOOD AS A LEGAL CATEGORY

THE AGE OF CONSENT

Submitted for the LL.B. (Honours) Degree at the
Victoria University of Wellington

2 September 1985

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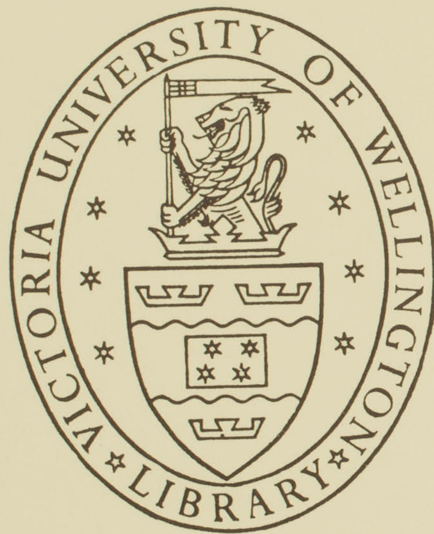
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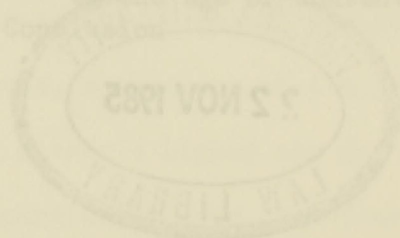

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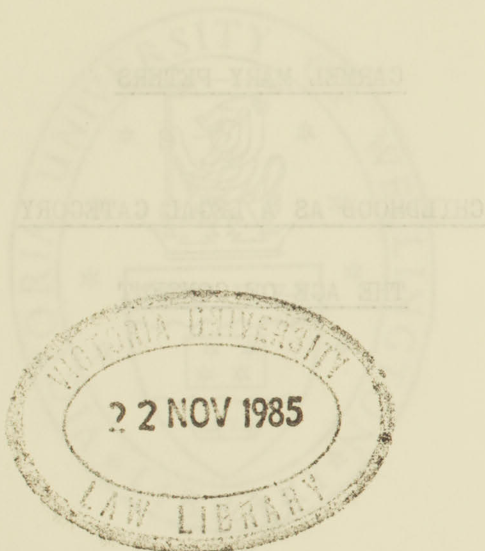

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INTRODUCTION

The Homosexual Law Reform Bill has initiated heated debate in New Zealand. One of the Bill's most controversial aspects is that of the age of consent. Many who support decriminalisation of homosexual acts in New Zealand do so on the condition that the age of consent (which at present is 16) is raised.

The Homosexual Law Reform Society, in their submission on the Bill, argue that all ages of consent are inherently arbitrary - offering a limited degree of protection to children.

> "Hence the choice of any age is bound to have a large arbitrary element and one can only hope for agreement that certain ages are too low, others too high, and set an age somewhere in between the two."[1]

Inherent in this attitude is a fundamental acceptance of the age of consent as a legal concept, acceptance of its arbitrariness.

In order to justify either a higher age for males in general, or homosexual males in particular, one of two arguments must succeed. It must follow that males in general mature later than females, or that the decision to engage in homosexual relations requires a greater degree of maturity than the decision to engage in heterosexual relationships. This places the whole issue of the age of consent within the framework of maturity analysis. Rather than attributing an arbitrary quality to the age of consent, it is seen to represent some transition to sexual maturity.

The significance of the present debate is that it has brought the age of consent into public focus. It is submitted that the struggle that both sides have encountered in their efforts to support or oppose a raised age of consent are symptomatic of the fact that no clear rationale exists behind this legal concept.

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This paper draws upon a variety of academic sources which may serve to confuse the reader. In the interests of clarity the objects of this paper should be outlined at the outset.

The basic premise on which this debate is founded is that the debate over the age of consent is one which is re-echoed throughout our statute books. Indeed the law has been invoked to create a legal category of childhood. The passing of age specific prohibitions appears to have followed a social discovery of childhood that has its roots in the 19th Century. Some analysis of this is important as it provides some context within which a discussion of the British parliamentary debates may be placed.

The debates themselves are examined to see on what basis age specific prohibitions may be justified. It is submitted that the problems the age of consent poses go beyond the question of transition to sexual maturity. It involves moral judgments which must be viewed bearing in mind the class and sex of those enunciating them. It is submitted that the situation becomes more problematical when we consider that the 19th Century was the age of reason and that there was a demand that political and moral assertions be substantiated by scientific evidence.

It is also important to examine how New Zealand politicians dealt with the same questions. It is submitted that the New Zealand convention of a "code of silence", in itself involved a failure of reason.

Given that historical dealings fail to withstand modern scrutiny, what implications does that hold for the present debate, or indeed the validity of other age specific prohibitions? The "jurisprudence of semi autonomy" offers a different angle from which the legal nature of youth may be viewed. However, the primary object of this exercise is to highlight the mixed sources of moral judgment that such questions involve.

Chapter 1 The Nature of the Debate

The transition from childhood to adulthood is something which different societies strive to articulate in different ways. Primitive societies mark the arrival of maturity by initiation ceremonies.

> "Initiates are ritually separated from everyday life into an excluded realm. After this separation they are ritually reincorporated back into everyday life in an altered state. Symbolically they are reborn."[2]

By removing this transition from the day to day experience the need for rational justification is precluded. In a sense social, moral and scientific influences on ages of majority, marge. This is supported by the fact that rites of passage tend to deal with the transition to adulthood in a uniform way - one age of majority for all aspects of adulthood.[3]

In societies such as ours the transition to adulthood is regulated primarily by law. There are three ways in which the state defers adulthood; liberties, entitlements and responsibilities. Our freedom to make certain decisions and exercise certain rights such as when we shall vote, drink, marry and work are all regulated by law. There are various pre-adult entitlements such as education, maintenance and health care, which are our prerogatives until we reach certain ages. Criminal and social responsibilities are deferred in recognition of youth. Until we reach certain ages we are not accountable for our decisions. Indeed the law has established a category of childhood by virtue of age grading. Childhood begins at birth and ends with a legislative judgment that the age of majority has arrived.

The law differs from "rites of passage" in that it purports to justify age specific prohibitions on rational grounds. It addresses specific aspects of adulthood assigning different ages in respect of individual areas. A simple example of this is that a person may vote at 18 but cannot consume alcohol in a public bar until they reach 20.

The age of consent is but one of many age specific prohibitions. On this basis any discoveries made in respect of this historical investigation have direct implications for the whole superstructure of age grading.

Chapter II The Historical Debate

Childhood Without Rights or Protections

The cherishing of children as innocent and different from adults is an outlook which can only be described as novel until the latter half of the 19th Century. Until then childhood, as a separate part of human development, was not socially recognised.

Phillipe Aries examines the "discovery of childhood" in relation to the depiction of children in art. He claims that medieval artists rarely painted children, and when they did it was merely an adult physique on a smaller scale.[4] Early on in his study he attributes this failure to recognise youth as being a demographic consequence. Whilst mortality rates were high, parents could not afford to invest emotion or affection in their offspring.

> "In the first case childhood was simply an unimportant phase of which there was no need to keep any record. In the second case - that of the dead child - it was thought that the little thing which had disappeared so soon in life was not worthy of remembrance."[5]

The influence of high mortality rates continued well into the 18th century.[6] When a child died, its name was given to the next born, the implication being that children were inherently dispensable.[7]

Children were not protected from the will of their parents. Whilst parents had a moral duty to support their offspring, there was no power of law to enforce this obligation. Moreover, a father's rights were paramount and could not be undermined by that of the mother.[8] It was not until the passage of the Infants Custody Acts that the issue of parental rights was brought under the jurisdiction of the courts - making maternal and paternal rights subservient to the welfare of the child.[9]

Children were not protected from the operation of the law. They were made criminally responsible at the age of seven. Pinchbeck & Hewitt claim that there are records of executions and transportations of children who were less than that age.[10]

Up until the latter half of the 19th Century the family was an integrated productive unit. Hence children began their careers in the workforce as early as three years of age. They worked in the agricultural gangs that roamed the rural areas of England.[11] They worked in the textile and pillow lace industries.[12] Their work as colliers and miners was in gross conditions with little account for human life.[13] There was work in the factories for those small enough to squeeze in between machines and pick up factory refuse.[14] Hours were long and wages low. There was virtually no education system and children knew little beyond the particular job they were doing.[15]

This apparent complacency in relation to the harsh circumstances of children, was a consequence of two trains of thought. First an acceptance of the natural order of things involving a hierarchical attitude to society: "a place for everyone and everyone in his place". Secondly, it was a consequence of the sanctity with which the family unit was regarded. Any attempt to undermine family stability was seen as a threat to social stability. Even early charitable organisations and reformers such as Shaftesbury balked at welfare measures which could be interpreted as encroaching on family territory.

> "Let the sins of the parents be visited on their children rather than undermine family solidarity."[16]

The Discovery of Childhood

The discovery of childhood cannot be viewed as an isolated event. It must be placed against a backdrop of changes to the social fabric of 19th Century England, that occurred as a result of industrialisation.

"Althouth there is little doubt, in contrast with previous centuries, that the 19th Century was truly "the century of the child" there is much doubt as to why that change to a modern outlook occurred at that moment in history."[17]

With the above qualifications in mind, it must be noted that the following discussion is not designed to be definitive in respect of "how this modern outlook occurred". All that is envisaged is the provision of some context, the creation of some image, within which the ensuing debates in respect of the age of consent may be placed.

It is submitted that the two aspects most relevant to an analysis of childhood as a legal category are the emergence of the bourgeois family model and the rise of science. The latter is fundamental to this discussion because the debates give rise to a tension between moral concern and statistical information. The former is important because it give us a valuable insight into the changed roles of women and children.

By 1850, the establishment of free market capitalism pushed women and children out of the workforce.[18] The economic lot of the working class improved - by 1870 wages had risen dramatically whilst food prices had stayed the same. The days of the family as an integrated productive unit were numbered.[19]

The social effects of industrialisation were urbanisation and a more mobile (socially and physically) fluid society. In order to counterbalance this, the privitisation of the home became an important feature of the social structure. Central to all this was the emergence of the bourgeois family model which had direct implications for the role of women and children. That the wife should stay home and adopt the bourgeois life-style was a tenet gaining credence in England.

> "That domestic life is the sphere in which final excellence is best displayed. It is a women's fundamental task to create a home that would provide an environment of emotional stability for her husband and children."[20]

An important aspect of this ideal was that women should be virtuous. Virginity, fidelity and morality were characteristics of the model mother/ wife. As a wife she had the task of creating an environment apart from the anxiety created by a loose, mobile, turgid world.[21]

Her primary function was the rearing of children for capitalist society.[22] In this respect there was a significant change in the way mothers received child-rearing information. Instead of imitating their own mothers, they looked to books and magazines for authoratative advice. Carl Degler, relying on journals and letters of 19th Centyry women, notes continual reference to "advice books".[23] This new literature promoted a new concept of childhood based on scientific studies. Their main thrust was that childbood was a time when young ones needed attention and supervision. It was a phase in preparation for adulthood, and as such the "adult" was taken out of the child.[24] Degler traces a change in the use of discipline. In the 18th Century discipline was used simply to achieve conformity and diligence. In the 19th Century it was a tool to break the bad habits and self will of children. Discipline was more refined, involving greater reliance on emotional manipulation.

> "Affectionate persuasion addressed to the understanding, the conscience and the heart" advised Herman Humphrey in 'Domestic Education' in 1840,"is a grand instrument to be employed in family government". Whipping, the advice books told them, should only be a last resort."[25]

Another by-product of these changes was the focus on children as individuals. Overt evidence of this lies in the fact that children were

no longer given the names of their parents or deceased brothers or sisters. They had their own special names. Moreover, a child's personality became all important.[26] Daniel Rodgers notes that after 1850 there was an increasing concern with the concept of "play" and "toys". He claims that many early writers urged the primacy of imagination in shaping children.[27]

The growing popularity of this middle class ideal was one of the more important forces behind the transformation to sentimental attitudes towards children. By the end of the 19th Century this sentimental view of children permeated the conscience of society, public and politicians alike. Literature, dwelling on the harsh attitudes and circumstances of children in England, both raised public awareness and marked the ascendance of childhood as a separate part of human development.

One example of the demand for reform was in the approach to juvenile delinquency. The views that young people were more susceptible to the example of vice; that retribution be rejected in favour of reform; that reform is more easily effected by separate juvenile prisons, all involved a recognition that a person's offences were somehow mitigated by youth.[28] However, the acceptance of reforms depended on whether they could be validated by scientific research.

> "Their views that vagrancy, neglect and ignorance were associated with delinquency were not so novel, or that reform was desirable. What was novel was that scientific studies made explicit assumptions that had previously been implicit and had possible rational solutions to problems."[29]

<u>Progress Through Science</u>

Historians often refer to the 19th Century as the "age of the rational man". During the 18th Century philosophers turned to science for the

salvation of the human race. It was thought that only through science could truths be expressed and evils eradicated.

> "The new scientific method was the breakthrough, the revelation men needed to ensure their future progress; now the way was clear ahead to the unremitting growth of the enlightenment."[30]

However, it remained to be seen whether mankind could be relied on to follow these truths - mathematically revealed. Philosophers acknowledged that reason was the slave of passions. This dilemma was resolved by the theory that passions could be governed by reason in the sense that if reason exposes truth then passions are bound to heed its conclusions.[31]

19th Century philosophers were no less impressed by the power of science for the good. They took it one step further and the idea emerged that vice was simply a consequence of ignorance. In T.L. Peacock's novel Headlong Hall, the perfectibilitist Mr Foster asserts

> "men are virtuous in proportion as they are enlightened and that as every generation increases in knowledge, it also increases in virtue."[32]

Some rejected the belief in free will in favour of a belief that will is predetermined by external circumstance operating on the individual constitution. The essence of philosophical thought is best summed up by John Passmore in his book The Perfectibility of Man.

> "Man had until that time been a mere child in respect of knowledge, and in consequence of virtue, he was now in a position as a result of the development of science to determine how human nature develops and what is the best thing for humans to do."[33]

For our purposes the rise of science has two implications. First a dichotomy of science and morality emerges. Faith in human instinct declined because it was subject to the irrationality of man.

Faith in science as a pure form of analysis rose. The two were mutually exclusive. Political or moral assertions could not stand alone. They required the force of scientific evidence to substantiate them.

Secondly, the equation that man plus knowledge equated progress was the premise on which early state intervention could be justified. The concern, for example, for the degraded conditions of the working class was based on the view that such a situation was a threat to the progress and safety of industrial society.

One movement that Grigg identifies in the 1880's in New Zealand, is that of the moral liberals. They advocated a code of pleasure, but prompted by recent developments in social science, biology, theology and medicine, their liberalism took an authoritarian turn when confronted with a situation that could impede race progress.[34] Interventionist practices were justified if they secured the wellbeing of the future generation. Furthermore, given privitisation of the house and the declining role of customary law in this new urban society, legislation was needed. Thus in New Zealand and the United States at least, old notions about the sanctity of the home gave way to a desire to

"educate, regulate and discipline children en masse."[35]

The obvious tension that arises, a background for all problems in this industrial, poste enlightenment society, is private morality versus public interest.

<u>The British Parliamentary Debates</u> (see Appendix I)

The first major change to the age of consent occurred in 1875 with the passing of the <u>Offences Against the Person Amendment Act 1875</u>. Previous efforts had been made to pass similar Bills in 1872, 1873 and 1874, but they failed to go behond a second reading.

The initiative came from a member of the Commons, Mr Charley. The object of the Bill was to extend the protection of the law to young girls between the ages of 12 and 14. Mr Charley felt that it was neither

"just fair nor statesmanlike to exclude from the protection of the law, girls of so tender and critical an age."[36]

The passage of the Bill through the Commons resulted in lowering the age from fourteen to thirteen. No reason was given for the amendments but later debates refer to it as something of a compromise. Members opposed this and previous Bills because in other European legal systems the age of consent stood at 12.[37]

The passage of the Bill through the House of Lords resulted in a further lowering of the age to 12. They justified this in reference to the age of marriage, which was 12, given parental consent. It was felt that the effect of the Bill would be to create an anomalous situation.[38] One of the Lords did point out that the proposed amendment to the Bill was inconsistant with the Education Act which kept children in the education system until they were 13,[39] but this did not persuade the majority.

The amendment was quite unacceptable to the Commons as it rendered the Bill quite useless. They passed it back to the Lords for re-consideration and the result was that "13" was reinstated.[40]

Overall the passage of the Offences Against the Person Amendment Act 1875 was remarkably smooth. However, no attempt was made by either opponents or supporters to consider the question of childhood. Amendments were made purely on the basis of expediency in that they amounted to a compromise between opposing factions.

In 1881 and 1882 there were two select committees in the House of Lords, headed by Lord Dalhousie, to consider the matter further.[41] It appeared that following the repeal of the Contagious Diseases Act there had been a significent rise in prostitution. They concluded that this was because police powers had been curtailed and as such, were no longer able to effectively deter prostitution. Extensive investigation produced evidence to the effect that there was a well developed traffic of juvenile prostitutes abroad, and a large problem of prostitution in urban areas.[42]

As a result of the Committee's findings, a Bill was introduced in the Lords in 1883 which among other things, proposed the raising of the age of consent in respect of a felony to 12 and that of a misdemeanour to 16.[43]

Clause 6: Defilement of a girl between 12 and 16.
This came under attack at the Committee stage. Many of the Lords thought 16 was much too high, the Government had gone too far in making what had previously been a moral offence, into a crime. They felt it would become a tool of extortion. Girls who looked older than 16 would use the clause to extort payment from unsuspecting men.[44]

Lord Truro had made enquiries into penal institutions and the officials there said that in 99% of the cases of men convicted under the Offences Against the Person Act 1875, temptation had come from the women.[45] He felt that this was an extreme measure to be taken on the basis of some flimsy enquiry by the Lords.

An amendment was inserted, giving men a defence of reasonable belief. This meant that if men reasonably believed the girl to be over 16, it was a valid defence.[46]

The Bill was passed by the Lords and went down to the Commons. It is not clear from Hansard what happend to the Bill. It appears that it did not get a first reading partly due to a lack of time and enthusiasm.

The Criminal Law Amendment Bill of 1884 was to follow a similar destiny. This time it was hedged with two safeguards. It included a defence where the man did not know the age of the girl and required the consent of the public prosecutor before proceedings could be taken.[47]

The introduction by Lord Dalhousie made it quite clear that the objects of the Bill were to suppress brothels and prostitution.[48] The atmosphere was one of caution. Its supporters acknowledged that this was new and controversial territory where legislation was concerned. The opposition confined themselves to an attack on the grounds of "faulty construction".

Clause 5: Defilement of a girl between 12 and 16 was again the object of heated debate at the Committee stage. One of the debate's distinguishing aspects is that there is an attempt by one of the Lords to nail down the principle behind the age of consent. Lord Mountemple moved that the clause be amended insofar as the age be raised to 17.[49] There and in subsequent stages he made a brave attempt at analysing the concept of maturity.

> "The age of 16 did not develop the faculties of will, force and knowledge of the world required to appreciate the dangers to which they were exposed, and the way of escape."[50]
>
> "The protection of the Bill was fixed at an age when girlhood passed into womenhood."[51]
>
> "A girl of 15 is a mere child trained to obedience, who found it difficult to say no and therefore couldn't be expected to resist the advances of a man of strong will and experience."[52]

The opposition did not ever refute those concepts head on. Lord Bramwell made an attempt to redefine the issue as one not against immorality but against offences which were in a sense unnatural.[53]

Lord Truro again referred to evidence, this time from the clergy who he claimed said that improper solicitation mostly came from girls under 12."[54]

The supporters of the Bill were wary of raising the age above 16 because of the tentative, innovative nature of the measure - to go further, it was felt, would be to put the Bill in jeopardy.

Finally, there was a last ditch effort after first reading to lower the age to 15. One of the reasons come close to making out a case for prostitution. It was argued that if prostitution was pushed off the street, it would infiltrate the private lives of British society.

Although it was enunciated once, it was an argument that occupied a place in the hearts of many.[55]

Secondly it was thought that the reputation of the House of Lords for restrained, sound judgment would be discredited by such an impulsive measure. Both arguments proved to be very persuasive as the clause stood by a mere 12 votes.[56]

The Bill then passed to the Commons where it was graced with a second reading before being abandoned.

The introduction of the 1885 Criminal Law Amendment Bill into the House of Lords was unexceptional as it had become an all too familiar scene. The age of consent had been lowered to 15 in the hope that it would be more acceptable in the Commons.[57] Lord Morten attacked this on the grounds of analogous statute, making the most coherent case for 16 yet.

He said it was an offence to abduct a female up until they were 16; that the Courts of Divorce dealt with children until they were 16; that guardianships lasted for 16 years; that children could not join unions or societies, part with property until they had reached the age of 16. However, political considerations remained paramount and the clause stood at 15.[58]

The introduction of the Criminal Law Amendment Bill to the Commons involved a general debate on the policy and effect of the Bill. The Secretary of State introduced it as being based on findings of the House of Lords Select Committee, which had shown an increase in juvenile prostitution. He referred to the great public demand to see the Bill become law. He said the Bill established no new principle, but merely extended existing legislation.[59]

Most accepted its introduction with caution, reserving the right to oppose particular clauses. However, the opposition, led by Mr Hopwood wasted no time in their general assault on the Bill. Some of their

arguments, which were many as they were varied, appeared to be very enlightened.

He and others argued that it was ineffectual to try and raise public morality by virtue of legislation.[60] This was endorsed by Mr Broadhurst who thought that prostitution would continue whilst the living standards of the working class remained so low. They argued that this was just another example of statute book crime - a sop to the populace. The latter argument was taken very seriously and means of effecting legislation were discussed.

The opposition then went on to argue that the only effect the Bill would have would be to make life harder than it already was for the "poor prostitute"; that it would reinstate draconian police powers such as compulsory examination of women - an infringement of human rights only recently disposed of by the repeal of the Contagious Diseases Act. The opposition then moved away from this sympathetic approach claiming that the Bill, if enacted, would be grounds for extortion.[61]

> "There were cases in which girls were steeped in depravity at the ages of 13-16 years and if the Bill was allowed to pass there would be a greater danger of young men and women and even boys being betrayed by designing creatures whose object was to levy blackmail."[62]

Lastly they argued that the Bill was making a change that was neither warranted or justified. Brothels had always existed and to pretend they were a recent phenomena was to feign innocence. This present legislation was the result of a moral panic brought about by two agencies; the press and the Salvation Army.

> "In fact it was such a Bill as might be expected to meet the approval of a church congress."[63]

Members were asked to justify their conversion when only ten years ago they had supported the amendment which lowered the age from 14 to 13.

At the Committee state, the specific issue of the age of consent was discussed in relation to clause 4: Defilement of a girl under 12.

Captain Price moved an amendment to substitute 13 for 12 although he failed to make any coherent argument in support of it.

Sergeant Simon wanted it raised to 14. He argued that given the distinction between a felony and a misdemeanor, the felony must be of a peculiarly savage nature. He claimed that a girl under 14 was immature in both mind and body and the man guilty of such defilement must be brutal indeed.

> "But at that age of 14 the girl was but a child .... there was neither knowledge or passion, or if there was it was the result of unusual precocity.[64]

He said it was not an offence of the "venial" kind because a girl of that age was incapable of knowing the meaning and consequence of what was done.[65]

The Secretary of State had a different view of the matter.

> "a child of 13 was certainly not able to have full knowledge ... But at 14 years the case was very different and he didn't think it was safe to go as far as that."[66]

Mr Hopwood on the other hand, knew of many girls at 13 who were debauched. They began a life of immorality at 7 and 8 years of age and, by the time they had reached 12, their careers were well established.[67]

Mr McCartney considered it a matter of degree. He said that it was a well established fact that puberty occurred between 13 and 15. The medium was therefore 14, and since they were bound to be cautious,[68] 13 was the appropriate age. The result of this debate was an amendment of Clause 4, whereby "13" was substituted for 12.[69]

Clause 5 Defilement of a Girl Between 13 and 15.

Sergeant Simon moved that the clause be amended to substitute 16 for 15. His reason was that girls of this age would not be able to forsee the consequences of the act they were about to commit. A girl of 16 years was after all comparatively a child.[70]

The Secretary of State looked towards more concrete means of justifying change. He referred to statistics revealing the ages at which females married over the past five years. He found that only 37 girls under 16 had got married. This he considered, was proof that girls of that age could not be looked on as mature because they had not arrived at puberty.[71]

Mr James Stuart moved that the clause be amended and "18" be substituted for "15". He thought the public favoured 18 and said he had little sympathy for the extortion argument.[72]

Sir William Harcourt felt that whilst 16 was appropriate, 18 went too far.

> "At 16 a girl was manifestly a child, a person of tender years, but when they came beyond that they were a woman."[73]

Mr Hubbard thought that 16 and 17 year olds were very impressionable and were easy prey to men, and thus supported the amendment.[74]

Other members shied from analysis of human development and tended to take into account caution and moderation in view of public opinion. Public opinion seemed very fluid. Mr Atkinson, after reminding the members of their representative capacity, and of their duty to judge feeling outside, recommended 21 years as the ultimate age of consent.[75]

Mr Hopwood took exception to this. He Reiterated his contention that these girls went wrong from a very early age and were just as familiar with the results of their actions as those of an older age. He said they should not consider this question from the point of view of their own daughters -

"they were from a different class and were not carefully nurtured, they had a familiarity with these things from a very early age and were able to take care of themselves."[76]

Mr Hopwood's assertions, whilst somewhat dubious in the enlightened age of the 20th Century, obviously took root. An amendment was moved to insert after Clause 5: "not being a common prostitute or of known immoral character.

"Was there any member of the Committee who was prepared to say that any son or relative should be brought under the law because he was enticed or inveigled by a woman of the town because she happened to be under 16 years."[77]

Mr McCoan thought that the object of the Bill was to protect young girls who were chaste, he thought a distinction should be drawn between prostitutes and chaste girls.[78]

Mr Harcourt thought the law as it stood would definitely make a man think twice before employing a girl under 16 in his service, particularly if he had any sons.[79]

Other members, however, thought that if this was effected it would give legal sanction to juvenile prostitution which defeated the objects of the Bill. This argument won the day and the Bill was passed with 16 substituted for "15".[80].

Commentary

It is submitted that the use of age grading as a legal symbol of the transition to adulthood is appealing because it is concrete, measurable and can be easily amended. However, the evidence contained in the debates expose it as a clumsy, subjective and inexact tool. It is always difficult to combat erroneous logic with reasoned argument and this case is no exception.

The themes that stand out as worth pursuing are the class and sex bias which riddle opinion on the one hand, and the mix of science and opinion on the other.

The moral and political tenor of the debate must be viewed within the context of the prejudices which influenced parliamentary thinking. Attitudes to women in the 19th Century reflect the "damned whore, God's Police" dichotomy. The Victorian model for women demanded that she be chaste and virtuous. This ideal was placed on a pedestal for male worship. Central to this ideal was the concept of female sexiness, a corollary of which is the idea of male sexuality being female responsibility. Women were the moral guardians of social purity. Departure from this role model resulted in women being damned as whores.[81] This double standard was legally enforced by making adultery a worse offence in women than in men.[82] A thick black line was drawn between 'prostitutes and chaste girls'.[83]

Given that the object of the Bill was to suppress prostitution, it is hardly surprising that the above attitudes to women permeate the debates. There is an overwhelming message by the opponents of the Bill that women who have sunk so low in depravity, are not worthy of legal protection. It should be noted that some politicians believed that immorality co-exists with a calculating mentality - hence the extortion argument.

The question of the tool of extortion appeared early on in the 1883 debates and persisted in various forms right through to the end of the 1885 debates. Thus it must be taken seriously. Many of the members clearly thought that females, even those less than 12, were designing, depraved, merciless creatures, who would leap at the opportunity of taking advantage of unsuspecting males.

Consistent with these attitudes is the idea that women are responsible for male sexual deviances and illicit practices. Lord Truro claims on two occasions that in the majority of cases temptation and solicitation came from the women. Similarly Mr Hopwood argues that it is not proper that men (particularly from their own class) be made criminally responsible simply because they were "enticed" by a woman who was younger than 16.[84]

Not only are women not worthy of legal protection, they don't need it as they are cunning enough to fare for themselves.

Moreover it is felt that legislation is useless because these women are beyond redemption. They have departed from chastity and as such cannot be redeemed.

The class structure must also be taken into account when considering these debates. The Bill was designed to suppress brothels and prostitution - a profession that the working class had a monopoly on. With the spread of Evangelical morality, vice and prostitution had been forced underground

"but not so far underground as to be invisible or unimportant."[85]

One view of Victorian morality is that it existed by virtue of the extent of a substructure of depravity. The degree to which politicians acknowledged this varies. Opponents of the Bill talk of the fact that prostitution exists and that the Bill is merely a consequence of a moral panic. Others go further and indicate that if prostitution is suppressed - vice will infiltrate private homes. Given the controversy of the 1860's as to whether prostitution should be licensed, perhaps this attitude is not surprising.

A class distinction becomes pronounced when politicians grapple with the extent of legal protection. Mr McCoan thought a distinction should be drawn between prostitutes and chaste girls.[86] Whilst age is the major criterion, class becomes vital as a point of legal distinction.

The proponents of the Bill had a different but equally middle class attitude; one based on philanthropy. If the moral wellbeing of the working class, particularly the females, was at risk, then it was up to them, as upstanding members of the community, to right this wrong. The overall feeling we get from all members is one of distance from the problem. They convey a gap between their own experience and the problem at hand.

Science/Opinion

The debates over the Bill show some effort by these 19th century politicians to rationalise a legal category of childhood. The 19th Century dichotomy of science and opinion makes it important in the interests of credibility to attempt some scientific analysis. It is submitted, however, that all too often opinion is promulgated under the guise of science.

Statistics are important for both the supporters and opposition to the Bills. The justification for introducing the Bill rests on the "Investigation" by the House of Lords Select Committee. Statistics are used by Lord Truro in the Lords, and the Secretary of State in the Commons. Others imply reliance on evidence - Mr Hopwood - there were cases of girls steeped in depravity ...[87] Obviously it is difficult to tell whether politicians such as Truro are concerned with fact or puffery. Moreover it is likely that such investigations would not withstand modern scrutiny. However, the fact that the attempt was made cannot be overlooked.

Attempts were also made to analyse the nature of childhood, largely unsuccessful due to the fact that they were highly subjective, generalised and lacked worthy evidence to substantiate them.

Lord Mountemple, in the introduction of the 1884 Bill, asserts that will, force and knowledge were not present before 16; that girlhood passed into womenhood at 16.[88] Similarly Mr Hopwood asserts that females under 12 do make decisions for which they should be accountable.[89]

Their analysis of puberty was loose and inconsistent. One member claimed that puberty started at 13 and ended at 15.[90] Another said that girls at 16 were not mature because they had not arrived at puberty.[91]

The criterion of the politicians for psychological maturity was even less concrete or consistent. Sergeant Simons said that inability to foresee the consequences of their acts was the relevant criterion, yet he failed to clarify what consequences he was alluding to. Was it the mental or moral anguish following juvenile sex or was he simply referring to physical consequences?[92]

The debates centres on two clauses which made a legal distinction between a felony and a misdemeanour. Yet no such distinction was made when discussing the nature of childhood. Members frequently used similar definitions in the debates of both clauses. Sergeant Simon thought the age should be higher for a felony because a girl of 12 was incapable of knowing the meaning and consequence of what was being done.[93] The same justification was used in respect of Clause 5 when discussing the raising of the age to 16.

Quite clearly, the legislature never really grasped concepts of immaturity. Parts of the debate seemed very much like a lottery.

> "13 year olds did not have full knowledge but the case of 14 year olds was quite different."[94]
>
> "16 was appropriate, but 18 went too far".[95]

It is submitted that the debates demonstrate that the issue of the nature of childhood was quite beyond the capacities of these 19th Century politicians. The social sciences were at an early state of development but even now it is a complex area quite beyond most lay persons. For the most part Parliamentarians operated on personal experience and gut reaction.

In the end, it boiled down to two things; public opinion and analogous statute. Whilst the latter seems to the legal mind a justifiable basis, it really begs the question if the legislative approach to questions of maturity are as flawed as were the age of consent debates.

Chapter III The New Zealand Debates (see Appendix 1)

The ways in which the New Zealand legislature approached the raising of the age of consent was markedly different from that of Britain. We have seen that the debates surrounding English reforms was stormy and that the proposed amendments were met with strident opposition. In contrast to this New Zealand legislation slipped through with virtually no debate to speak of. For our purposes this means that there is little emperical evidence as to the political attitude to the proposed changes to the age of consent.

The fact that our Parliamentarians were less than eloquent on this matter can be put down to two reasons. First, there was the New Zealand "code of silence" in respect of all things relating to sex. Secondly, the overall reluctance of the New Zealand legislature to enact these reforms. When they did, it amounted to an adoption of the British stance.

Problems involving illicit sexual practises were not easily or lightly discussed in the 19th Century. Several of the introductions into the English House of Lords refer to the Bills "as a very distasteful matter indeed". Their New Zealand counterpart got around this linguistic difficulty by doing what they had always done - refusing to discuss it at all.[96]

> "Members of Parliament, whenever they found themselves confronted with a "sex problem" in the House, skimmed quickly over the matter, hinting at information they thought it best to conceal and referred sternly to their distaste for such business."[97]

A Minister of Justice introducing the 1888 Offences Against the Person Bill announced that

> "he did not care to revel in such filth, and would not disgust the House by relating some of the things that had come to (his) attention recently but would say there was a necessity for the Bill." [98]

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On the occasions when some discussion was necessary, Parliament ensured that no records were kept. In 1888 a vast majority in Parliament decided in a debate on prostitution, to disallow the keeping of any record in Hansard.[99]

The Code of Silence was imposed by custom rather than law and it permeated the whole of New Zealand society. The Courts refused the publication of sex crimes. The press, early New Zealand novelists and poets were all discreet in their reference to sexual matters.

> " They avoided hard facts by making use of a whole variety of conventional euphamisms. Prostitution was referred to as the "social evil"."[100]

The second reason why there is little or no debate on the age of consent is due to the disinterest of politicians at the time. It is submitted that puritanism which was most public in advocating reforms to the age of consent, was never representative of New Zealand society. Moreover they had little appeal in Parliament.

Steven Eldred Grigg in his recent book Pleasures of the Flesh, claims that early colonial New Zealand was more sexually emancipated than any other English speaking country[101] due to the prosperity and mobility of the population. It is suggested that they did not respond well to puritanism, and its impact on New Zealand's moral code was slight.

After 1880 depression set in, gold rushes petered out, and the population settled. This economic and social change was a prime time for purists to set about imposing old religious proscriptions on this irreligious population. They were joined by feminists and moral liberals in respect of their child saving reforms, which included a demand for laws against incest and the raising of the age of consent.[103]

In 1880 the cry was taken up in respect of the age of consent. Throughout the decade Parliament successfully ignored the problem - in fact one politician thought it was too high and should be lowered because "girls developed so rapidly".[104] By the end of the decade, however,

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politicians became painfully aware that New Zealand was the only English speaking country that did not protect girls over 12. In 1888 a Bill was introduced to raise the age to 16 (in order to be consistant with England). This was aggressively opposed as an invasion of privacy. Subsequent Bills were more moderate in their demands.[105]

Whilst by the turn of the Century the puritan movement was successful in terms of incest laws, censorship and the age of consent, the New Zealand legislature was really headed in the other direction. It was at that time that marriage laws were becoming more liberal, divorce more accessible. Other socially liberal laws were being enacted to improve the economic and legal status of illegitimate children.

The puritans failed to win the favour of the landed gentry in New Zealand who controlled Parliament. This class was essentially interested in the economic growth of the country and as such, used their legislative capacity only as a means of achieving such ends.

> "The Sex Bills were usually doomed not only because the Puritans were just a little band in Parliament, as a Conservative Landowner observed in 1903, but also because they were politically naive, knowing little about the way to win politicians and influence premiers, they were single issue enthusiasts convinced that sex or drug reforms would cure all ills of society. They were stubborn in a Political system based on compromise and preachy where oratory was not important." [106]

Central to S.E. Grigg's analysis of 19th Century New Zealand society, is an effort to dispell the myth that serves to exaggerate the importance of puritanism in New Zealand. He claims that following an upsurge in the New Zealand economy, a new morality emerged that, contrary to popular belief, was not based on the puritan vision of a chaste and Christian society. Rather it was based on what he terms - a code of pleasure.

" it also disseminated a new mood of tolerance for acts which were traditionally regarded as unnatural, were now seen as victimless crimes or even no crime at all. Sexual acts based on force, violence or money on the other hand began to be stigmatised."[107]

The most important point that emerges from this discussion is that British laws were very tardily and very reluctantly accepted in New Zealand. It was the influence of Westminster that eventually persuaded New Zealand politicians that social reform in respect of the age of consent was needed. However, political disinterest combined with the New Zealand convention of a code of silence, in itself points to a failure to consider childhood as a legal category - a failure by default.

Chapter IV Age Specific Prohibitions; Historical Dilemma:

The main object of this historical exercise has been to examine the thought processes of 19th Century politicians in relation to the age of consent. Taken together, the British debates and the New Zealand approach demonstrate what is best described as a failure of reason. Neither legislature manages to come up with a clear rationale behind the age of consent.

The British debates highlight the traps that this area creates, traps which may be of some relevance when considering the tenor of the debate in relation to the Homosexual Law Reform Bill. The object of the 1885 Criminal Law Amendment Bill was to suppress prostitution. The opinions of politicians therefore, were coloured by attitudes to women and to the lower class in general. Any discussion as to what was morally right and what was morally wrong was clouded by a certain amount of prejudice and served to side track politicians from the central issue - the age of consent.
19th Century politics was infused with the idea that only through science could truth be revealed. It did not seem possible that the two tend to serve each other and that science in itself involves value judgments. Quite apart from the fact that their reasoning (in terms of age reflecting maturity) did not withstand modern scrutiny in terms of what we know about human development, the two sources of judgment cannot be invoked separately, and yet simultaneously to establish the norms and criteria of a transition to adulthood. It is submitted that what we face from the evidence, is the dilemma of dealing with a construct that involves moral and social implications yet seeking to do so through science.

The law purports to be predicated on logic and principle. The evidence that has emerged from this historical survey derogates from that assumption. The extent to which the flaws inherent in the development of the age of consent are representative of other age specific prohibitions is at this stage a matter for speculation. Obviously the arrival at any age is based

on value judgments by politicians. However, it is not enough to criticise the reasoning that comes through in the debates. The problem is that the allocation of maturity on a certain birthday is a legal fiction which in itself can no longer be sustained. The ethic of individualism that stresses the uniqueness of each person, the uneven nature of personal development, is irreconcilable with legislative age grading.

It is submitted that there are two possible conclusions. Either we abandon the whole concept of age specific prohibitions, or we search for a new paradigm on which they may be justified.

The overall absence of any satisfactory legal reasoning in these matters, has prompted a Children's Liberation Movement in the United States. This movement sees itself as a derivative of the Black Liberation and Women's Liberation Movements. Its ideology is that full civil rights be extended before birth.[108] However, by doing this we abolish youth as a legally relevant concept and thus come the full circle. It is submitted that this proposal involves a denial of the developmental process of individuals which cannot be substantiated.

The Jurisprudence of Semi Autonomy

The Civil Rights Movement was not only concerned with racial and sexual equality. It recognised that even imperfect, unfinished beings have interests in liberty. It advocated rights for the handicapped, for prisoners and for the aged. Perhaps children may be viewed as unfinished beings with liberty interests.

One of the major flaws involved in age specific prohibitions is that no distinction is made between "children" and "adolescents". F.E. Zimring, in his book the Changing Legal World of Adolescence, points out that psychological and sociological liturature speaks at length of "the adolescent", yet this term has not found its way into

our law libraries or statute books. The fact that the decision making powers of a six year old differ vastly from that of a 16 year old, has not been given legal recognition.

> "the adolescent, unlike the child, uses available information to entertain theories and look for supporting facts, consider alternate solutions to problems, project his thinking into the future, and tries to categorise thoughts into usable forms."[109]

The fact that adolescence is a period in itself means that it demands from the law

> "a peculiar mix of liberty and order that is anything but simple to achieve." [110]

Moreover it is a time when the art of responsible decision making is developed.

> "If decision making takes practise then the right kind of growing up takes place over time rather than on a particular birthday."[111]

From this the learner's permit is derived. The law should accommodate this growth period by allowing some freedom of choice. The problem that arises is that some adolescents will make grave mistakes whilst acquiring decision making skills.

> "There is a gamble when we extend choices to the not yet adult."[112]

The most that can be done is to minimise the quantity and quality of mistakes made so that the more drastic errors may be avoided. This may be done by phasing particular rights. The right to [to drive may be granted if the right to] drink is withheld. In many jurisdictions this is already happening. However, it is equally important to state general principles and define what is already the case as it is to prescribe new approaches. At present, the different ages of majority all appear to be arbitrary and unrelated. Why is it that you may earn, be conscripted and yet not be able to vote? If the law accepted the idea of the "learner's permit", the presumption of maturity is rebutted.

When allocated a right, the need for a simultaneous responsibility is diminished. In this sense the allocation of specific ages would begin to take on some meaning as a whole.

"pushed along by degrees toward moral and legal accountability."[113]

Phasing is still based on the traditional framework of age specific prohibitions and privileges, but within that a substantially different approach may be devised. Zimring suggests a "presumption" of two ages of majority, 18 for liberties and 21 for entitlement.[114] Unless there is a good case to rebut this presumption (involving a downward or upward shift) it is presumed to be the appropriate age.[115] By extending liberties before the termination of entitlements and allocation of responsibilities, decision making is encouraged within a protective framework.

Individual Variation: This phasing doesnot however, overcome the problem of individual variation which is extensive. Under the above scheme those who are "adult" at 17 are still penalised. There are several points that may be made in this respect. First, the penalty is a temporary one, unlike discrimination against women or Blacks. Secondly, for the law to cater for individual needs there would have to be personalised statute books - a patently absurd suggestion. Perhaps we are back to square one in the sense that age specific prohibitions ought to be abandoned. What then are the alternatives.

Zimring suggests two alternatives - competence testing and decentralised discretion.[116] Neither of these are satisfactory in themselves. Competence testing would mean that some would acquire rights and adult status very early and others would never acquire it. This would make for unacceptable inequality.

Decentralised discretion involves individuals making an assessment of others. This is unsatisfactory in the sense that it is uncertain - a complete absence of criteria and norms.

A combination of all three, age grading, competence testing and individual discretion may make for a more accurate scheme. Indeed certain activities are reliant on all three. When learning to drive, a minimum age operates to ensure minimum safety. In order to get one's license candidates are tested. Since most adolescents do not own cars parental discretion is an important part of the system.[117]

This proposition highlights an important point. The law by itself cannot regulate with any accuracy, the transition to adulthood. It can only offer coersive guidelines that may assist in the development towards maturity. Age grading is particulatly appropriate when the capacity to test competence is weak and the consequences of the mistakes threaten the individual or others in the community.[118]

Application of the Jurisprudence of Semi Autonomy To The Age of Consent

The above discussion involved an attempt to construct a jurisprudence of semi-autonomy. How do these concepts apply to the age of consent.

Semi Autonomy: This is an area where the consent of semi autonomy may be clearly viewed. Most people are repulsed when confronted with a case of child molestation because children have no way of understanding the nature and quality of sexual acts. Yet in cases of post puberty the situation becomes more problematical. Most females are physically mature by 13 and thus the question of whether they are psychologically mature to make a valid consent makes this a very grey area.

The legislative debates support this. First the discussion was most contraversial in considering the ages between 12 and 16. Secondly, the historical distinction between a felony and a misdemeanor suggests that the nature of the offence is mitigated by the age of the victim.

In short the distinction between adolescents and children is marked in the context of the age of consent.

Learner's Permit: It is submitted that there are two ways of viewing the age of consent. It either represents a turning point of psychological maturity or it is a limited protection in the face of social reality. If it is the latter then perhaps the idea of the learner's permit is already incorporated in the law.

If it does purport to represent psychological maturity then it is a legal fiction. In order to encourage responsible decision making the idea of phasing ought to be invoked. There are two points to be made. First, what liberties may be extended so that this mature approach may be developed. Secondly, even if some choices were extended would they affect the ability to make decisions in this area. It is submitted that phasing would not be of much assistance in this area.

Competence Testing and Decentralised Discretion According to Zimring these assist in the problem of individual variation. They could be made to do more than that. Since the age of consent - as a representation of psychological maturity is suspect to say the least, these could assist in the development of a more mature attitude.

Obviously literal competence testing is not possible. However, if it was broadened to include some sort of educational programme, it may be very relevant to the transition to sexual maturity. Here these concepts could be invoked to justify sex education at an earlier age.

Failing this, the "least harm" concept could be useful. Zimring claims that sometimes adolescents should be accorded rights, not because they have a right to a particular thing, but because they have a right not to be gratuitously harmed.[119] This often involves a balancing process of the lesser of two evils.In the case of whether adolescents should be entitled to contraceptives without parental consent, Zimring comes down on the side of the affirmative. He says there is a general rule that parents have the right to know what medical treatment is being received by their children. However, if denying contraceptives to adolescents is going to result in

juvenile pregnancy, exception must be made. This exception is not premised on the right to contraceptives but on the right not to be gratuitously harmed.[120]

Perhaps this least harm analysis could be used to justify sex education - it would certainly fill a large gap left by the law.

Discretion, particularly parental discretion is an important part of any well conceived regulatory scheme. The age at which females engage in sexual intercourse is ultimately in the hands of their families and the community. This is important in relation to the age of consent because in many respects the law is a toothless prohibition because it is such a difficult area to police. The problem with decentralised discretion is that it is unreliable. Nothing can force parents to participate in ensuring the right decision is made at the right time.

<u>Conclusion</u>: The debate surrounding Homosexual Law Reform in relation to the age of consent is based on an underlying acceptance of it as a legal concept. The age of consent is but one age specific prohibition in our statute books. The overriding purpose of this paper was to investigate the historical forces and patterns of thinking that culminated in the creation of a legal category of youth - using the age of consent as a case in point. This is not to deny, however, that there are moral qualms peculiar to this specific area of age grading.

Research exposed the fact that childhood as a social concept is a fairly recent phenomena. Up until the 19th Century children were integrated into the adult world at a very early age. The emergence of the bourgeoise family ideal was a significant factor in creating a more sentimental attitude to children and promoting childhood as a separate stage of Development.

The law followed this social change as parliament enacted "child saving" reforms. The British Debates on the age of consent showed a failure to understand fully what was at stake. The moral qualms of

politicians, the class and sex bias and opinion masquerading as science fettered the debates. The New Zealand approach fared worse as politicians refused to address the issue at all.

Thus far criticism has been directed at the architects of age specific prohibitions. It may be that the legal fiction can no longer be sustained. The fact that, deeming people to be mature for the purposes of the law runs counter to the ethic of individualism may be beyond the power of the law to reconcile. The jurisprudence of semi autonomy attempts to offer a different angle from which age grading can be viewed. Central to the arguments of Zimring is that the law should be structured to accommodate the gradual transition to maturity.

Learner's permit analysis, phasing, competence testing are all different techniques available to reach a desired end.

> "the pushing along by degrees toward moral and legal accountability".

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Appendix I

New Zealand's history as an independant law making body is a short one. Even after the repugnancy rule was removed our legislature appears to have closely followed that of Britain. The English Laws Validity Act 1858 removed initial doubt as to whether British law applied in New Zealand. This Act declared that the laws of England, so far as applicable to the circumstances of the colony, to have been in force on and after 14 January 1840.

The relevant British law in 1840 was the Offences Against the Person Act 1828. In 1828 Westminster passed an act consolidating and amending the Statutes of England relating to offences against the person. Section 17 made it a felony to have carnal knowledge of a female under 10 years and a misdemeanour to have carnal knowledge of a female under 12. In 1861 New Zealand expressly adopted the British law governing the age of consent.

In 1875 the British Parliament passed the Offences Against the Person Amendment Act 1975. Section 3 made it a felony to carnally know a female under 12 years of age. Section 4 made it a misdemeanour in respect of a female under 13 years of age.

Ten years later Westminster further raised the age of consent. The Criminal Law Amendment Act 1885 was passed. Section 4 made it a felony to carnally know a female under 13 years of age. Section 5 made it a misdemeanour to have carnal knowledge of a female between 13 and 16 years of age.

New Zealand followed Britain's example some years later. In 1889 The Offences Against the Person Act Amendment 1889 No. 17 was passed. Section 2 made it a misdemeanour to have carnal knowledge of a girl between 12 and 14 years of age.

The law relating to offences against the person was consolidated into the Criminal Code 1893. In 1894 a Criminal Code Act Amendment 1894 No. 41

was passed. Section 2 raised the age of consent for a misdemeanour to 15 years of age. Two years later the Criminal Code Act Amendment 1896 No. 7 was passed. Section 3 made it a misdemeanour to carnally know a girl under 16 years of age.

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