COMMENT

Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights

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Introduction

On 25 December 1991 the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) came into force for Australia.[1] On the same day, the first communication from an Australian citizen under the Protocol was sent to Geneva.[2] The communication, authored by a Tasmanian gay man, alleges that Tasmania's laws which criminalise sex between consenting male adults in private are in breach of Australia's obligations under the ICCPR.

This comment briefly describes the communication and examines its implications for both international and national law. An assessment is made of the likely outcome of the case, having regard to the Committee's jurisprudence and European precedents. The impact of the communication within Australia is then examined. This examination involves two aspects. First, the communication as a precedent in terms of the procedure which Australia will adopt when called upon to answer cases alleging breaches within areas primarily the responsibility of the States. Second, the constitutional implications should the committee form the view that Tasmania's laws are inconsistent with the Covenant.

The Communication

Gay law reform has been a heated and divisive issue within Tasmania for many years, crystallising with the formation of the Tasmanian Gay and

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1 Australia's instrument of accession, 999 *UNTS* 171; ATS 1991 No 39.

2 United Nations' Human Rights Committee, Communication No 1992/488.

Lesbian Rights Group (TGLRG) in 1988. Attempts to reform Tasmania's criminal laws have been repeatedly rejected by the Tasmanian upper house, the Legislative Council. This frustration led the TGLRG to attempt to force reform via an Optional Protocol communication, authored by Nick Toonen.[3]

The Tasmanian Criminal Code (1924), as amended, criminalises all male homosexual acts between consenting adults in private.[4] The communication alleges that these laws violate Australia's obligations under the Covenant to respect the author's privacy[5] and equality[6] rights.

The progress of the case to date

The TGLRG Communication was sent to Geneva on Christmas day 1991, the day on which the Optional Protocol entered into force. At its meeting on 10 April 1992,[7] the Working Group of the Committee decided to transmit the communication to Australia as the State party concerned. It also decided to request information and observations from the Australian government on the question of admissibility. The Working Group further decided to request the author to clarify how the impugned laws personally affected him. Both the government and the author were given a time limit of two months.

The TGLRG responded with the requested clarification dated 14 July 1992. After a request for more time, the Australian government submitted its views on admissibility on 10 September 1992. This submission did not dispute the admissibility of the communication, despite a Tasmanian request to do so.[8] On 5 November 1992, the Human Rights Committee declared the communication admissible.[9] The Committee noted that, despite the State party's decision not

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3 "Gays plan UN bid to change Tasmanian law", *The Age* (26 September 1991), p 16.

4 Section 122 provides:

> Any person who –
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> (a) has sexual intercourse with any person against the order of nature;
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> (b) has sexual intercourse with an animal; or
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> (c) consents to a male person having sexual intercourse with him or her against the order of nature,
>
> is guilty of a crime.
>
> Charge: Unnatural sexual intercourse.

Section 123 provides:

> Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.
>
> Charge: Indecent practice between male persons.

The last conviction under these provisions was in 1981. The penalty was a $50 fine. The maximum penalty under the sections is 21 years' gaol.

5 ICCPR article 17, and ICCPR article 17 in conjunction with article 2(1).

6 ICCPR article 26.

7 UN Doc CCPR/C/WG/44/D/488/1992 (1992).

8 See below, text accompanying notes 52–55.

9 UN Doc CCPR/C/46/D/488/1992 (1992).

to dispute admissibility, it was the Committee's duty to ascertain whether the admissibility criteria had been met. On the question as to whether Mr Toonen was a "victim", the Committee stated:

> The Committee notes that the provisions challenged by the author have not been enforced by the judicial authorities of Tasmania for a number of years. In this respect, it considers that the author has made reasonable efforts to demonstrate that the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion have affected him and continue to affect him personally, and that they may raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee is satisfied that the author can be deemed a victim within the meaning of article 1 of the Optional Protocol...[10]

The Australian government was given six months to submit information on the merits. The author will be given a further six weeks to comment on any such information submitted, once that information has been transmitted to the Committee. The implications of the procedures adopted by the Commonwealth government in presenting submissions on admissibility are discussed below.[11]

The alleged breaches of the Covenant

Article 17 of the ICCPR provides:

> 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The communication alleges that the impugned laws violate this right in a number of ways. First, the laws in themselves violate the right "because they bring private activity into the public domain (... the domain of the legislative, the judicial and the executive arms of government ...)".[12] Second, the laws violate the right because they permit "the police to enter a household on the suspicion that two consenting adult homosexual men may be committing a criminal offence ... and seize evidence (including private correspondence)".[13] Because "there is no gain to society through the enforcement of these laws the ... violations of the right to privacy so outlined can be considered arbitrary".[14]

The communication also alleges that the laws violate the author's right to protection from discrimination in the right to privacy. This follows from a reading of article 17 in conjunction with article 2(1). Article 2(1) provides:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as

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10 Ibid, p 5.
11 Text accompanying notes 52–55.
12 Communication, p 16.
13 Ibid.
14 Ibid.

> race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The argument proceeds as follows. In so far as the impugned laws violate the right of gay men to privacy, and in so far as those laws do not prohibit private, consensual sex between adult heterosexuals or lesbians, the laws make an impermissible distinction under article 2(1). This is because the laws make a distinction on the grounds of sex (explicitly mentioned in article 2(1)), and on the grounds of "sexual activity, sexual orientation and sexual identity",[15] which the communication argues falls within "other status".

Further, the communication alleges that the impugned laws violate the author's rights under article 26, which provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similar to the argument based on article 2(1), the communication argues that in so far as the criminal laws do not prohibit private, consensual sex between adult heterosexuals or lesbians, they make gay men "unequal before the law and unable to claim the equal protection of the law".[16] The communication further argues:

> The fact that the laws in question are not currently enforced should not be taken to mean that homosexual men in Tasmania have effective equality under the law. "Equal protection of the law" refers to the substance of the law as well as its application. The original draft of Article 26 referred only to equality before the law. The reference to equal protection of the law was included at the initiative of the Indian delegation because procedural equality was not sufficient if the laws were unequal: U.N. Doc A/C3/SR. 1097 par. 187. Thus the amendment deliberately imported into Article 26 the requirement that the laws themselves be equal.[17]

The communication also deals with the issues of exhaustion of domestic remedies,[18] and how the impugned laws have an adverse effect on the author, despite the fact that he has never been charged under them.[19] The communication alleges that all legislative remedies have been exhausted by the repeated attempts at decriminalisation which have been rejected by the

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15 Communication, p 19.
16 Communication, p 22.
17 Ibid.
18 A necessary prerequisite to admissibility under articles 2 and 5 of the Optional Protocol, and rules 80 and 90(f) of the Committee's Rules of Procedure, UN Doc CCPR/C/3/Rev 2 (14 December 1989).
19 Also a necessary prerequisite to admissibility. This prerequisite is implied in article 1 of the Optional Protocol, which states that "victims" of a violation may send a communication to the Committee. The same requirement is contained in rule 90(b) of the Committee's rules.

Legislative Council. It further alleges that there are no applicable administrative, nor judicial remedies because human rights treaties have not been incorporated into Australian law, and because Australia has no constitutional nor legislative bill of rights on which to found judicial review.

On the issue of adverse effect, the communication alleges the following. The mere presence of such laws contribute to the author's experiences of low self-image and alienation. He has experienced condemnation, denunciation and vilification from public figures. The laws have also denied him full access to information and support regarding HIV/AIDS prevention. In addition, the laws result in a stigma attaching to gay men which have disadvantaged the author in employment. He has also faced police harassment in protesting against the laws.

As noted above, the Working Group of the Human Rights Committee decided on 10 April 1992 "[t]hat the author be requested to clarify how the application of [the criminal laws] have personally affected him". In response to this, Mr Toonen provided further information which basically expanded on the points raised in the original communication. He stressed the jurisprudence of the European Court of Human Rights, which has not required the prosecution of individuals before holding admissible cases impugning similar laws to those in Tasmania.[20] The further information provided to the Committee goes on to describe how the impugned laws are an affront to the dignity of the author, threaten his privacy and liberty, create the conditions for discrimination in employment, stigmatisation, vilification, the threat of physical violence and the violation of basic democratic rights, and create the conditions for the deprivation of important information and personal fulfilment.

Although the Committee has declared the communication admissible, the question of the impugned laws' effect on Mr Toonen will be re-examined at the merits phase.

Assessment: The Committee's Jurisprudence and Factors Affecting the View the Committee will Form

Sexuality is not mentioned in the ICCPR. The Human Rights Committee has never examined the question of whether distinctions on the basis of sexual identity are impermissible under the Covenant. The issue did arise indirectly in the case of *Hertzberg et al v Finland*,[21] a case concerning freedom of expression under article 19. Certain radio and television broadcasts dealing with homosexuality were censored by Finnish authorities relying on provisions in the Finnish penal code which made it a criminal offence to publicly encourage "indecent behaviour between persons of the same sex". The Committee was of the view that no violation of the ICCPR had occurred,

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20 *Dudgeon v United Kingdom*, 4 EHRR 1981, p 149; *Norris v Ireland,* 13 EHRR 1989, p 186.

21 Communication R 14/61.

because article 19(3) allows restrictions to be placed on the right of free expression "for the protection ... of public health or morals".

The Committee stated "[i]t has to be noted ... that public morals differ widely. There is no universally applicable common standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities."[22] Articles 17 and 26 of the ICCPR contain no equivalent provisions allowing restrictions to be placed on the rights therein declared. The issue will arise, however, in the Committee's examination of whether the distinction made between heterosexuals and homosexuals by Tasmanian law has an "objective and reasonable" foundation (see below).

Interpretation of articles 2(1), 26 and 17

It is necessary to examine whether "sexual identity" falls within "other status", and the jurisprudence of the Human Rights Committee concerning privacy and equality.

Is sexual identity included under the category of "other status" contained in articles 2(1) and 26 of the Convention? There can be little doubt that sexual orientation amounts to a separate and recognisable "status". Gay men and lesbians form a significant percentage of the population with a recognisable group consciousness and community. Men and women with an exclusive orientation towards members of their own sex often construct much of their social and economic lives around their orientation. It is interesting to note that the Australian government itself as early as 1981 concluded that "homosexuality" was a "status" that would fall within the terms of the ICCPR.[23]

The Committee has not stated its attitude to the interpretation of "other status". However, its general comment on non-discrimination[24] makes clear that it will give a broad interpretation to articles 2(1) and 26. The decisions by the European Court of Human Rights in *Dudgeon v United Kingdom*[25] and *Norris v Ireland*[26] and the recent decision of the European Commission of Human Rights in *Modinos v Cyprus*[27] will also strengthen the case for the author. Although the European Court has not specifically discussed whether

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22 Quoted in Charlesworth, "Equality and Non-Discrimination under the Optional Protocol" in Centre for Comparative Constitutional Studies, *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992), p 51 at 58.

23 Australian Human Rights Bureau, *Report to the Attorney-General on the Complaint by the Gay Rights Lobby: Laws Relating to Homosexual Acts in the Australian Capital Territory* (1981), p 7.

24 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1 (1992), p 25.

25 Note 20 above.

26 Ibid.

27 Application 15070/89. Decision noted in *Information Note 103, 228th Session of the European Commission of Human Rights* (19 March 1992), p 8.

homosexuality is comprehended under "other status", it has impliedly accepted the argument.[28] Recognising homosexuality as comprehended under "other status" also fits the broad construction given to this phrase by the European Court in 1976. The court broadly construed "other status" to "prohibit ... discriminatory treatment having as its basis or reason, a personal characteristic ... by which persons or groups of persons are distinguishable from each other".[29] In relation to the ICCPR, as Charlesworth notes, "if attendance at public or private schools is considered a status for the purposes of Article 26 ..., a fortiori so is sexual preference".[30]

The jurisprudence of the Committee concerning article 26 is relatively well developed and summarised in its general comment on non-discrimination.[31] Although the ICCPR does not contain a definition of discrimination, the Committee has accepted a definition which parallels the definitions given in the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination. The general comment states:

> the committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[32]

This definition would imply that any law which overtly differentiates between individuals on the basis of their status would be *prima facie* discriminatory. This conclusion is supported by further comments of the Committee with respect to the "equality before the law" clause in article 26:

> [i]t prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of Article 26 that its content should not be discriminatory.[33]

This also would seem to provide the author of the communication with a good *prima facie* case with respect to Tasmania's criminal laws. However, a very important proviso to the equality right must be examined. The Committee states "not every differentiation of treatment will constitute discrimination, if

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28 See, in particular, *Dudgeon*, n 20 above, paras 64–70.

29 *Kjeldsen v Denmark*, 23 Eur Ct H R (Ser A) (1976), p 29.

30 Charlesworth, n 22 above, p 57. The comment was made in reference to the Human Rights Committee's views in *Blom v Sweden* and *Lindgren v Sweden*, which both concerned alleged discriminatory funding between private and public schools.

31 Note 24 above.

32 Ibid, p 26.

33 Ibid, p 27.

the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".[34]

This comment reflects the adoption by the Human Rights Committee of a three-part test when forming a view that a legislative provision is in violation of article 26. The test stems from the decision of the European Court in the *Belgian Linguistics* case.[35] First, the facts must disclose differences in treatment before or in the pertinent law. Second, the criteria for differentiation must be incapable of being objectively and reasonably justified or lack a legitimate aim. Third, even if the law can be justified, there must be proportionality between the means adopted and the legitimate aim.

Past decisions of the Committee reflect its reluctance to find that a law is incapable of being objectively and reasonably justified.[36] This perhaps presents the biggest problem for Mr Toonen in establishing that the provisions of the Tasmanian Criminal Code violate article 26. It will raise the question of the Tasmanian government's "margin of discretion" in assessing public morality. This issue is discussed further below.[37]

The communication also alleges that the impugned Tasmanian laws violate article 17 of the ICCPR. The right to privacy set out in this article is not absolute. Article 17 provides that interference with the right cannot be "arbitrary or unlawful". Thus, it is implicit that certain limitations are permissible. A balancing test is applied between the interests of the individual and the interests of the community,[38] in a similar fashion to the tests applied under the equality provisions of the ICCPR.

The Committee's General Comment on article 17 provides some indication of how the Committee construes the privacy right. The Comment makes clear that the right is required to be guaranteed against interference from attacks emanating from State authorities.[39] On the question of the interpretation of "arbitrary", the Comment states:

> In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.[40]

On the question of the relative nature of the right and the balancing of interests between the individual and society, the Comment states:

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34 Ibid.
35 1 EHRR 1968, p 252.
36 See Charlesworth, n 22 above.
37 Text following n 49.
38 See Bailey P, *Human Rights: Australia in an International Context* (1990), pp 279-81.
39 Note 24 above, p 20.
40 Ibid, p 21.

> [a]s all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which *is essential in the interests of society* as understood under the Covenant.[41] (emphasis added)

It should be noted that this interpretation has much in common with the words of article 8(2) in the European Convention on Human Rights. Article 8(1) of the European Convention sets out the right to privacy. Article 8(2) provides for limits on this right. It states:

> [t]here shall be no interference by a public authority with the exercise of the right [of privacy] except such as is in accordance with the law and *is necessary in a democratic society* in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (emphasis added)

This similarity in wording makes the European Court's jurisprudence concerning privacy (discussed below) highly relevant to the interpretation of article 17 of the ICCPR. The Committee's own jurisprudence on article 17 provides little help in predicting the outcome of Mr Toonen's communication. This is because most cases decided by the Human Rights Committee under article 17 have concerned interference with family or correspondence.[42]

The European Court has specifically addressed the issue of the right to privacy and sodomy laws. Originally, the European Court held that, although sodomy laws were a violation of the right to privacy, they were justified under article 8(2) as being "for the protection of health and morals".[43] The court altered its views in 1981, in the *Dudgeon* case.[44] Mr Dudgeon was a gay man resident in Belfast. He alleged that the sodomy laws in force in Northern Ireland were in breach of the right to privacy outlined in article 8 of the European Convention, at least in so far as those laws criminalised consenting homosexual sex between adults in private. The laws in question bear no relevant distinctions with the Tasmanian provisions.

The European Court held that the laws did amount to a violation of the Convention. On the question of whether article 8(2) justified the laws, the court stated:

> the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private

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41 Ibid.

42 See, for example, the four cases extracted in *Selected Decisions of the Human Rights Committee under the Optional Protocol* vol 2, UN Doc CCPR/C/OP/2 (1990).

43 See *Application No 530/59*, 1960 Y B Eur Conv H R, p 184 at 188; *X v Federal Republic of Germany*, 1976 Y B Eur Conv H R, p 276; *X v United Kingdom*, 1978 Y B Conv H R, p 354.

44 Note 20 above.

> life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.[45]

The court recognised that the regulation of homosexual activity might be "necessary" to some degree, but blanket prohibitions could not be justified as "necessary in a democratic society".

It should be noted that there is a possible point of distinction here between article 8 of the European Convention and article 17 of the ICCPR. Article 8(2) explicitly states that restrictions placed on the right must be "necessary". The European Court in *Dudgeon* construed this concept quite strictly. It is not enough that interference with the right of privacy be justified as "useful, reasonable, or desirable" to protect morals or the rights of others. Interference is "necessary" only in response to a "pressing social need".[46]

It is unclear whether the Human Rights Committee will take the same restrictive view of limitations placed on the right to privacy under the ICCPR. The Committee may determine that a limitation must only be "reasonable", in pursuit of a legitimate goal under the Covenant. This would accord with the Committee's views regarding legitimate distinctions permissible under the equality right. It would allow States a greater "margin of appreciation/discretion" under the privacy right in the ICCPR, than the European Court has allowed under article 8. However, it should be noted that the Committee's General Comment on article 17, quoted above, would seem to indicate an adoption of the "necessity" limitation, rather than one based on reasonableness. The Committee stated that public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is *essential* in the interests of society.

On the question of whether the limitations on the right to privacy expressed in the sodomy laws were "necessary", the European Court examined two aspects. First, it examined the laws in the context of Northern Ireland society. Second, it examined the laws in the context of European society generally. While noting the difference of opinions prevalent in Northern Ireland, the court inferred that there was no deep-rooted opposition to private homosexual conduct between adults. It inferred this from public indifference to the fact that the laws had not been enforced in recent years. The court placed great emphasis on dramatic social changes in the rest of Europe, increased tolerance towards gay men and lesbians and general decriminalisation. This combination of local indifference and "European consensus" led the court to conclude that there was no pressing social need to retain criminal sanctions against adult, consensual homosexual acts.

Similarly to Mr Toonen's communication, Mr Dudgeon relied on both the privacy and equality provisions in the European Convention. The European

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45 Ibid, para 61.
46 Ibid, para 51.

Court's decision was based solely on the privacy right. Having found that the sodomy laws in question amounted to a violation of the privacy right, the court saw no need to deal with arguments based on equality. This aspect of the case has produced much criticism from lesbian and gay groups.[47]

Basing its decision on privacy also allowed the European Court to avoid addressing the issue of discriminatory age of consent provisions. Mr Dudgeon had submitted that, because of the equality provisions, the age of consent in relation to all sexual acts should be the same. The court rejected this, concluding that the age of consent issue fell within the "margin of appreciation" left to individual States.[48] In *Norris v Ireland*,[49] the European Court affirmed its decision in *Dudgeon*, invalidating the Republic of Ireland's sodomy laws.

These two precedents will obviously be influential on the Human Rights Committee's decision. They do not however, determine the issue. The test which the Human Rights Committee will adopt in deciding what type of limits on the right to privacy are justifiable, and the view the Committee will take regarding the weight to be placed on "community views", at both the national and international level, will be crucial. These issues are discussed in the next section.

Likely outcome of the communication

It is obviously impossible to predict the Committee's view. A number of factors will be relevant to the decision it eventually makes. These factors may be summarised as follows:

(1) the conservative nature of the Committee, and the broad "margin of appreciation" it allows to individual States;

(2) the Committee's assessment of the relevance of the European Court's jurisprudence, including the tests adopted with respect to limitations placed on the privacy and equality rights;

(3) the Committee's assessment of both local and international community attitudes towards homosexuality; and

(4) the strength with which the Commonwealth defends the Tasmanian laws.

It is necessary to further examine points 2 and 3 above. Before this, however, certain general predictions can tentatively be made. If the Committee does form the view that Tasmania's sodomy laws are in violation of the ICCPR, that view will be formulated in the narrowest possible terms. The

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47 See, for example, Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights" (1990) 65 *New York Uni LR* 1044 and Kane, "Homosexuality and the European Convention on Human Rights: What Rights? (1988) 11 *Hastings Int'l and Comp LR* 447.

48 Note 20 above, paras 52, 64–66.

49 Note 20 above.

Committee will find on the basis of a breach of article 17 (privacy), not article 26 (equality). The decision will be narrowly framed, only dealing with Tasmania's discriminatory criminal laws. It will not address the issue of whether gay men and lesbians are entitled to the same equality rights as other people. It is also unlikely that the Committee's decision will deal with discriminatory age of consent provisions.

The biggest problem faced by Mr Toonen will be in convincing the Committee that Tasmania's sodomy laws cannot be justified. As outlined above, neither the equality right nor the privacy right are absolute. The equality right is limited by permissible distinctions reasonably made in pursuit of legitimate State objectives and interests in the regulation of society. The privacy right is limited, either on the same "reasonableness" criteria, or (more broadly) on the basis of regulation "*essential* in the interests of society". If the Committee can be convinced to form the view that the impugned laws would not be reasonable under article 26, necessarily they will also form the view that the laws are not "essential in the interests of society" under article 17. For present purposes, the question therefore can be reduced to whether Mr Toonen will be able to establish that the laws cannot be reasonably justified in pursuit of legitimate State goals.

Establishing this will involve an assessment of the harm done to Mr Toonen and other gay men by these laws, as opposed to society's interest in maintaining them. As noted above, the Committee has already sought clarification on the former point. In respect of the latter, two factors will be relevant. First, the Committee will need to look at Tasmanian and Australian attitudes to homosexual acts, and the "margin of appreciation/discretion" which will be permitted to the domestic government. Second, the Committee will be concerned with the international community's attitudes, especially the attitudes of other States parties to the ICCPR. This is potentially problematic.

The resolution of the case may indeed depend upon the weight which the Committee gives to these various factors. On the issue of Tasmanian and Australian attitudes, the author is in a strong position to be able to convince the Committee that the laws cannot be justified as "reasonable" in light of prevalent community attitudes. Every State and Territory within Australia, except Tasmania, has decriminalised consenting homosexual acts. South Australia, New South Wales, Queensland, the Northern Territory and the Australian Capital Territory all have some form of anti-discrimination protection for gay men and lesbians. The Commonwealth has also legislated to prohibit sexual orientation discrimination in employment. With respect to community attitudes in Tasmania, the communication contains much evidence adduced to establish that a substantial proportion of the population is in favour of decriminalisation.[50] In addition to this, the author's case is strengthened by the European Court precedents, which determined that public condemnation of homosexuality could not justify the intrusion of the criminal law into the realm

50 Communication, pp 29–35.

of the private. Despite the broad "margin of appreciation/discretion" left to domestic governments, the combination of the above factors should be sufficient to convince the Committee that the laws cannot be reasonably justified.

More problematic, however, will be the views of the international community and, particularly, other States which are parties to the ICCPR. The Human Rights Committee will obviously have grave concerns over invalidating sodomy laws as a violation of the ICCPR, when so many States which are parties to that Covenant condemn homosexuality on religious and cultural grounds. The European Court, in *Dudgeon* and *Norris* stressed the European consensus on this issue. It will be impossible for the Human Rights Committee to find any international consensus in favour of decriminalisation and in favour of increased protection for gay men and lesbians. If anything, international consensus points in the opposite direction.

This is not, however, fatal to the author's case. Much will depend upon the willingness of the Committee to adopt a "cultural relativity" attitude to the rights contained in the Covenant. It would certainly be possible for the Committee to form the view that, in light of prevailing Australian attitudes, Tasmania's laws amounted to a breach of *Australia's* obligations under the ICCPR. This does not necessarily entail a decision that all sodomy laws, in all States which are parties to the ICCPR, also violate the Covenant. Such a ruling would be entirely consistent with the doctrine of "margin of appreciation/discretion", and should not cause undue alarm on the part of other States who have ratified the ICCPR.

Assessment: Domestic Implications for Australia

As the first Australian communication under the Optional Protocol, Mr Toonen's communication will obviously influence the procedure adopted in future cases. The implications for Australian federalism are extensive. Most alleged violations of the ICCPR are likely to be the result of actions taken by, or laws existing in, the various Australian States and Territories. Yet it is the Commonwealth government which has the responsibility of submitting Australia's position in relation to communications, and the Commonwealth government which will have the responsibility of acting in response to the views the Committee takes. The Commonwealth Attorney-General's Department had stated that cooperative arrangements with the States and Territories would be relied upon to implement the processes of the Optional Protocol.[51] However, Mr Toonen's communication has already hammered further nails into the coffin of "cooperative federalism" in the implementation of human rights obligations.

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51 Rose, "Commonwealth State Aspects: Implementation of the First Optional Protocol" in Centre for Comparative Constitutional Studies, *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992), p 35 at 42–43.

Implications regarding procedure for future Australian communications

The Optional Protocol Unit within the Attorney General's department has had to formulate its procedures on the run. At its inception, it was immediately faced with Mr Toonen's communication and the Human Rights Committee's request to give Australia's views on the issue of admissibility. The Unit wrote to the Tasmanian Attorney-General in June 1992, requesting a "report" on the question of admissibility. Tasmania responded within the month, outlining the submissions it wished the Commonwealth to make. In essence, Tasmania requested that the Commonwealth dispute admissibility on a number of grounds. These included that Mr Toonen was not a "victim" of any violation, that no violation had occurred, that Mr Toonen had not offered any substantiation in respect of a claim against Australia (as distinct from Tasmania), and that Mr Toonen had failed to exhaust all available domestic remedies.[52]

Despite Tasmania's request, the Commonwealth did not dispute admissibility. In its brief submission to the Committee on admissibility, the Commonwealth simply stated, "[t]he Australian Government does not wish to challenge the admissibility of Mr Toonen's communication on any ground. In particular, the Government does not contest admissibility on the ground of failure to exhaust domestic remedies."[53] The submission was stated to be "without prejudice to any arguments the Australian Government may wish to present to the Committee at the merits stage of its consideration of Mr Toonen's communication".[54]

The fact that the Commonwealth did not present the submissions urged by Tasmania has important ramifications. Prior to this, it had been unclear whether the Commonwealth would make an independent assessment of information and arguments presented by a State. It was equally unclear whether the Commonwealth would see its role as merely defending a State's position.[55] On the basis of the procedures adopted in relation to Mr Toonen's communication, these questions may now be answered. It seems that the Commonwealth will independently assess its position and will not view itself merely as a conduit for arguments presented by the States.

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52 Letter to Mr GA Mowbray, Adviser, Human Rights Civil Law Division, Attorney-General's Department from Mr Simon Allston, Senior Crown Counsel for Tasmania, dated 24 June 1992. The letter was obtained by the TGLRG under Tasmanian freedom of information laws.

53 Submission by the Australian Government on the Admissibility of the Communication (10 September 1992), p 3.

54 Ibid.

55 See the Comment by Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *Melbourne Uni LR* 428 at 432.

Constitutional implications should the Committee form the view that the impugned laws violate the ICCPR

Mr Toonen's communication also has significant implications in terms of Commonwealth legislative powers. If the Committee forms the view that Tasmania's impugned laws violate the ICCPR, the question is raised as to what Australia's response will be. Although the Committee's views are not directly "binding" on the respondent State, that State has an obligation under article 2(3) of the ICCPR to remedy any violation of the rights contained in the Covenant.[56] Further, in 1990, the Committee instituted a new procedure whereby respondent States are given six months to respond to the Committee's view that a violation has occurred. A Special Rapporteur for the Follow-Up of Views has been appointed to monitor responses.[57] In addition, the Committee has made clear that it expects States in their periodic reports to include information on measures adopted in response to a Committee's view. While it is true that the Committee's only "enforcement weapon" is publicity about a State's lack of response, the power of this weapon should not be underestimated. It would cause enormous damage to Australia's international credibility in the human rights field if it failed to take any measures to remedy a violation declared by the Committee.

It is unlikely that the present Tasmanian government (and in particular the Legislative Council) will repeal the impugned laws, even if the Committee regards them as in violation of the ICCPR. It is also unlikely that the Committee would accept a Commonwealth plea of lack of power, on the basis of federalism, as an excuse for inaction.[58] Thus the question is squarely raised as to whether the Commonwealth could legislate under the external affairs power[59] to override provisions of State law, viewed by the Committee as a violation of the ICCPR.

There can be little doubt that the High Court would uphold Commonwealth power to legislate to enact provisions of the ICCPR.[60] This does not, however, preclude a Tasmanian challenge to any such legislation. Tasmania could

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56 Thomson, "Using the Optional Protocol: The Practical Issues" in Centre for Comparative Constitutional Studies, *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992), p 16 at 28–30.

57 *Report of the Human Rights Committee* UN Doc A/45/40 (1990) vol II, pp 205–06.

58 Article 50 of the ICCPR and article 10 of the Optional Protocol expressly state that the provisions of both documents "extend to all parts of federal States without any limitations or exceptions".

59 Australian Constitution, section 51(xxix).

60 The broad scope of the external affairs power has been established beyond challenge in a series of High Court cases over the past decade. See *Koowarta v Bjelke Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Dams* case); *Richardson v Forestry Commission* (1988) 164 CLR 261 (the *Lemonthyme* case); *Queensland v Commonwealth* (1989) 167 CLR 232 (*Queensland Rainforest* case); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (the *War Crimes* case).

possibly challenge Commonwealth legislation on three bases. First, that the external affairs power will not support legislation enacting a non-binding view of the Human Rights Committee. This argument is unlikely to succeed on its own merits, even if the Commonwealth accepts the characterisation that any Commonwealth law is based on the Committee decision. However, the Commonwealth would have a stronger response if it argued that it is not enacting a view of the Committee, but an obligation imposed by the ICCPR.

Second, Tasmania could possibly argue that the particular terms of the Commonwealth legislation went beyond the purposes of the ICCPR. This argument will, of course, depend upon the scope of the Committee's view and the scope of any Commonwealth legislation. For example, in the unlikely event that the Committee formed a view based on a breach of the equality provisions of the ICCPR, this would support broad Commonwealth anti-discrimination legislation protecting gay men and lesbians.

Finally, Tasmania could possibly argue that any legislation, even if *prima facie* valid, contravened the implied limitations imposed by federalism. These limitations are: the requirement of non-discrimination against a State, non-imposition of some special burden or disability upon a State, non-impairment of the continued existence of a State and its capacity to function. Once again, Tasmania would be unlikely to succeed on this ground, because of the narrow way the High Court has construed these limitations.[61]

Thus, it is likely that any Commonwealth legislation would be held to be valid. The real problem will not be in convincing the Commonwealth that it has the power to legislate, but in finding the political will in Canberra to exercise that power.

Conclusion

The communication launched by the TGLRG will be a "test case" in more ways than one. It will, perhaps, be one of the most controversial communications heard by the Human Rights Committee in recent years. It raises many questions concerning both the Committee's jurisprudence and domestic Australian attitudes. Will the Committee have the skill to speak out against an obvious human rights violation without causing extensive controversy among States who are parties to the ICCPR? Will the Tasmanian and Commonwealth governments show themselves capable of political maturity and a true commitment to the protection of much discriminated against minority groups? The merits phase of Mr Toonen's communication and its aftermath will reveal the answers to these questions.

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61 See *Queensland v Commonwealth* (1985) 159 CLR 192 (*Queensland Electricity Commission* case) and the cases cited in n 60 above.