

# Gay Rights Under the ICCPR - Commentary on *Toonen v Australia*

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In the first communication concerning Australia under the First Optional Protocol to the International Covenant of Civil and Political Rights (ICCPR), *Toonen v Australia*,<sup>1</sup> Nick Toonen complained of Tasmanian laws criminalising sexual relations between consenting males. On March 31, 1994, the United Nations Human Rights Committee (the 'Committee' or 'HRC') unanimously found that Australia had violated Toonen's rights under Articles 17 (guaranteeing a right to privacy) and 2(1) (guaranteeing non-discrimination in the exercise of the Covenant's guarantees) of the ICCPR.

## *The Law at Issue*

Section 122 of the Tasmanian *Criminal Code* 1924 reads, inter alia:

Any person who

(a) has sexual intercourse with any person against the order of nature;

(b)...

(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.

'Unnatural sexual intercourse' means anal or oral intercourse, or any penetrative sex which is not vaginal.<sup>2</sup>

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I would like to thank Andrew Carter and Peter Larmour for sending me valuable information from Australia.

1 Communication no 488/1992.

2 See Tasmanian Gay and Lesbian Rights Group (TGLRG), *Gay Law Reform in Tasmania: Information for the Media* (1993) p 3. Section 122(b) outlaws sexual intercourse with animals.

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 upon himself or any other male person, is guilty of a crime.

Charge: Indecent practice between male persons.

'Gross indecency' can mean any act of physical intimacy between men, but generally refers to any sexual activity which is not penetrative. Indecent assault refers to physical intimacy, without the necessity of coercion or abuse.<sup>3</sup>

The maximum penalty for conviction under these sections is 21 years imprisonment.

### *Federal Liability for State Wrongs at the International Level*

At this point it is helpful to mention that Article 50 of the Covenant specifies that:

The provisions of the present Covenant shall extend to all parts of federal states without any limitations or exceptions.

Thus, there is no doubt that the Government of the Commonwealth of Australia is liable for breaches of the Covenant perpetrated by one of the States.<sup>4</sup>

### *Admissibility Decision*

On 5 November 1992, the HRC found the case admissible. Indeed, the Federal Government did not dispute admissibility.<sup>5</sup> The HRC does however ex officio examine the admissibility of complaints.<sup>6</sup>

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3 TGLR, note 2 above, at p 3.

4 An early ambiguous Australian federal 'reservation' (for discussion, see G Triggs, 'Australia's Ratification of the International Covenant on Civil and Political Rights: Endorsement or Repudiation?' (1982) 31 *ICLQ* 278, especially at 290-294) has been withdrawn: see H Burmester, 'Federal Clauses: An Australian Perspective' (1985) 34 *ICLQ* 522 at 536-537, note 54, and UN Doc CCPR/C/2/Rev 3, pp 5-8, 34-35.

For an example of the difficulties that can be caused by a federalist division of constitutional powers, see the facts and submissions in *Ominayak v Canada* (167/1984) at, eg, paragraph 28.1, and *Ballantyne et al v Canada* (385/89). Violations of the Covenant by Canada were found in both cases, due to the actions of, respectively, the Provinces of Alberta and Quebec.

The main potential bar to admissibility lay in Article 1 of the First Optional Protocol, which prescribes that authors of complaints must be actual 'victims' of a violation of their rights under the Covenant.<sup>7</sup> Neither of the above-cited Tasmanian provisions has been enforced since 1981. Thus, it is arguable that Toonen was never likely to suffer any violation of his rights, as the laws were increasingly unlikely to be enforced. However, the HRC accepted Toonen's submissions that the laws' existence adversely affected him as there was no guarantee that they would not be enforced in the future.<sup>8</sup> Furthermore, Toonen contended that the laws had caused him actual harm: their continued existence helped generate vilification of homosexuals, including himself, in Tasmania.<sup>9</sup>

### *Decision on the Merits: the Australian Submissions*

The Federal Government virtually conceded that Toonen's rights had been violated, whereas the Tasmanian Government submissions, which were nevertheless sent to the HRC, strongly argued against admissibility, and then against a finding of violation. The Federal Government thus confirmed that, as the respondent to Optional Protocol complainants, it will independently assess its position<sup>10</sup> rather than automatically stand by the arguments submitted by the relevant Australian State. This is important as many, if not most, alleged human rights violations in Australia are likely to come within the constitutional arena of States' powers.<sup>11</sup>

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5 Paragraph 5.1.

6 Eg in *JHW v the Netherlands* (501/92), the HRC found the case inadmissible even though the State party raised no objections to admissibility.

7 Of course, there is an exception where the 'victim' is unable to communicate with the HRC, for good reason, eg, being held incommunicado, or being dead: see *Guerrero v Colombia* (45/79).

8 See paragraph 2.2, and, as part of the HRC's decision on the merits, paragraph 8.6. This decision emulates that of the European Court of Human Rights in *Dudgeon v UK* (1981) 4 EHRR 149, paragraphs 29-33, 41, and *Norris v Ireland* (1988) 13 EHRR 186, paragraph 33.

9 Paragraph 2.5.

10 See H Charlesworth, 'Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melb U L R* 428 at 432. Similarly, dual submissions were made by the Federal Government and the Quebec provincial Government in *Ballantyne et al v Canada* (359, 385/1989). In that case, the submissions were not as polarised as the separate submissions of the federal and State governments in *Toonen*.

11 Charlesworth, note 10 above, at 432.

## Article 17

Article 17, ICCPR, reads as follows:

1. No one shall be subjected 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 relevant provisions of Tasmania's *Criminal Code* were found to violate Toonen's rights under Article 17. This aspect of the decision follows the European Court of Human Rights' judgments in *Dudgeon v UK*,<sup>12</sup> *Norris v Ireland*,<sup>13</sup> and *Modinos v Cyprus*,<sup>14</sup> where similar laws proscribing all consensual sex between adult males were held to violate the corresponding right to privacy, Article 8, in the European Convention of Human Rights (ECHR).

It seems surprising however that the HRC, an international body made up of members from a wide variety of cultural backgrounds, is more liberal in this respect than the United States Supreme Court majority. In *Bowers v Hardwick*,<sup>15</sup> a law criminalising all acts of sodomy in Georgia was found not to violate the Fourteenth Amendment of the US Constitution, which protects, inter alia, a right to privacy.<sup>16</sup> The majority felt unable to bring the subject matter of the Georgian laws within the concept of privacy:

[A]ny claim that [Supreme Court precedents] stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unworkable.<sup>17</sup>

In contrast, in *Toonen*, the HRC stated: 'it is undisputed that adult consensual sexual activity in private is covered by the concept of

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12 (1981) 4 EHRR 149.

13 (1988) 13 EHRR 186.

14 (1993) 16 EHRR 485.

15 478 US 186 (1986).

16 See *Griswold v Connecticut* 381 US 479 (1965); the right to substantive due process in the Fourteenth Amendment protects against infringements of one's 'liberty', including one's right to privacy, even though 'privacy' itself is not expressly protected by the US Constitution.

17 At 191; see also 195-6. Justice Blackmun, in his dissenting opinion, criticised the majority for focusing on 'the right to commit homosexual sodomy', rather than 'the right to be let alone' (at 199).

"privacy"...<sup>18</sup> As this invasion of privacy was authorised by ss 122 and 123 of the *Tasmanian Criminal Code*, it was not possible to deem the invasion to be 'unlawful'. However, the HRC continued:

As to whether it may be deemed arbitrary, the Committee recalls that pursuant to its General Comment 16[32] on Article 17, the 'introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by the law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the circumstances.'<sup>19</sup> The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>20</sup>

The Federal Government submissions conceded that the Tasmanian provisions were 'arbitrary' within the meaning of Article 17.<sup>21</sup> The Tasmanian Government however argued that:

the challenged laws are justified on public health and moral grounds, as they are intended in part to prevent the spread of HIV/AIDS in Tasmania, and because, in the absence of specific limitation clauses in Article 17, moral issues must be deemed a matter for domestic decision.<sup>22</sup>

Regarding the public health argument, the HRC disagreed that criminalisation of homosexual practices was a reasonable way of combatting the spread of HIV/AIDS. In this respect, it noted the Federal Government's argument that such criminalisation actually hindered public health programmes 'by driving underground many of the people at risk of infection'.<sup>23</sup> This accords with the majority opinion of experts working to contain the epidemic, where there is little enthusiasm for the retention of the challenged Tasmanian laws.<sup>24</sup> The HRC added that 'no link has been shown between the continued criminalisation of homosexual activity and the effective control of the spread of the HIV/AIDS virus'.<sup>25</sup>

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18 Paragraph 8.2.

19 UN Doc HRI/GEN/1, 4 September 1992, pp 20-21.

20 Paragraph 8.3.

21 See paragraphs 6.4-6.8.

22 Paragraph 8.4.

23 See paragraph 8.5, and Federal Government submission at paragraph 6.5.

24 See M Atkinson, 'Homosexual Law Reform' (1992) 11 *U Tas L R* 206 at 206-7.

25 Paragraph 8.5.

Regarding the Tasmanian contention that the laws were morally justified, the HRC stated:

The Committee cannot accept ... that for the purpose of Article 17 of the Covenant, moral issues are exclusively a matter of domestic concern, as this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy.<sup>26</sup>

Indeed, it seems that acceptance of the Tasmanian argument that moral issues are solely a matter for domestic jurisdiction would have drastically reduced the individual's right to privacy under the Covenant. State claims of moral justification could only be investigated as to whether they were bona fide; any apparent unreasonableness entailed in the moral justification would be irrelevant. The HRC continued:

[W]ith the exception of Tasmania, all laws criminalising homosexuality have been repealed throughout Australia and that, even in Tasmania, it is apparent that there is no consensus as to whether Sections 122 and 123 should not also be repealed. Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions do not meet the 'reasonableness' test in the circumstances of the case, and that they arbitrarily interfere with Mr Toonen's right under Article 17, paragraph 1.<sup>27</sup>

It is therefore clear that the HRC were influenced by the evidence of a general attitude of tolerance towards and acceptance of homosexuality in Australia. For example, the Federal Government submitted that 'a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society.'<sup>28</sup>

Furthermore, Mr Toonen submitted that 'there is significant popular and institutional support for the repeal of Tasmania's anti-gay criminal laws...'<sup>29</sup>

... Australia is a pluralistic and multi-cultural society whose citizens have different and at times conflicting moral codes. In these circumstances, it must be the proper role of the criminal laws to entrench these different codes as little as possible; insofar as some

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26 Paragraph 8.6.

27 Paragraph 8.6.

28 Paragraph 6.7.

29 Paragraph 7.1.

values must be entrenched in criminal codes, these values should relate to human dignity and diversity.<sup>30</sup>

Therefore, the HRC decided that the moral agenda epitomised by the challenged legislation was out of step with the attitudes prevailing within Australia as a whole, and within a reasonably large section of the Tasmanian population. In such circumstances, the claim of moral justification could not be sustained.

### *Non-Discrimination (Articles 2(1) and 26)*

Article 2(1) reads:

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

The HRC found a violation of Article 17(1) in conjunction with Article 2(1). They found that Toonen had suffered discrimination on prohibited grounds in the enjoyment of his right to privacy.

As to the question whether 'sexual orientation' could be deemed to be an 'other status', the HRC stated: 'the Committee confines itself to noting ... that in its view the reference to "sex" in articles 2, paragraph 1, and 26<sup>31</sup> is to be taken as including "sexual orientation".' Hence, discrimination on the basis of one's sexuality is prohibited by the Covenant. In this respect, it is submitted that the HRC arrived at the right conclusion via the wrong avenue. It seems simple enough to characterise 'sexuality', a personal characteristic, like all of the enumerated grounds, of gay people, as a relevant 'other status' within the meaning of Articles 2(1) and 26.<sup>32</sup> However, it does not seem logical to characterise 'sexual orientation' as coming within the meaning of 'sex' per se. It is true that in this case Toonen did suffer from sex discrimination: lesbian sex is not a crime in Tasmania, whereas sex between men is. However, if all gay sex were outlawed, the discrimination then occurring would be on the grounds of sexuality, not sex.

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30 Paragraph 7.2.

31 See below.

32 Cf A Bayefsky, 'The Principle of Equality of Non-Discrimination in International Law' (1990) 11 *HRLJ* 1 at 6. Wennergren, in his individual opinion in *Toonen*, found that sexual orientation, like the enumerated grounds, was based on 'biological or genetic factors'. It is submitted that such a thesis is unproven.

There is no doubt that s 123, proscribing 'indecent behaviour between males', discriminates against Toonen on the basis of his sex and his sexuality. However, ss 122(a) and (c) are framed in gender-neutral language. Unnatural sexual intercourse is prohibited in all relationships, not only those between men. The Tasmanian Government argued that 'the challenged laws do not discriminate between classes of citizens but merely identify acts which are unacceptable to the Tasmanian community.'<sup>33</sup>

The Australian Government however argued that the Tasmanian contention:

inaccurately reflects the domestic perception of the purpose or the effect of the challenged provisions. Such laws are clearly understood by the community as being directed at male homosexuals as a group.<sup>34</sup>

Toonen added in his submissions that 'the combined effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men.'<sup>35</sup> Furthermore:

Despite its apparent neutrality, s 122 is said to be by itself discriminatory. [It] has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active. At the same time, the provision criminalises an activity practised far more often by men sexually active with other men than by men or women who are heterosexually active.<sup>36</sup>

The latter argument raises the issue of indirect discrimination,<sup>37</sup> that is, s 122 discriminates because it 'affects' gay men more than other people, despite its apparent neutrality.

The HRC unfortunately gave no detailed reasoning as to why a violation of s 2(1) was found. From a juristic point of view, it is important to know whether s 122 by itself breached Article 2(1). If so, it would help confirm the Covenant's applicability to indirect discrimination which is, at present, likely but uncertain.<sup>38</sup>

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33 Paragraph 6.13.

34 Ibid.

35 Paragraph 7.6.

36 Paragraph 7.7.

37 As expressly recognised by Mr Toonen.

38 See A Lester, 'Non-Discrimination in International Human Rights Law' (forthcoming). The author worked on this paper with Lord Lester of Herne Hill for the Judicial Colloquium on the Domestic Application of



Article 26 reads:

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.

Article 26 has been interpreted very broadly; it, unlike Article 2(1), prohibits discrimination in the exercise of rights other than those in the Covenant.<sup>39</sup> For example, discrimination in relation to social security rights is not permissible under the Covenant, even though 'social security' per se is not a right guaranteed by the ICCPR.<sup>40</sup>

Both the Federal Government<sup>41</sup> and Mr Toonen<sup>42</sup> argued that a breach of Article 26 had occurred. However, the HRC simply stated:

Since the Committee has found a violation of Mr Toonen's rights under Articles 17(1) and 2(1) of the Covenant requiring repeal of the offending law, the Committee does not consider it necessary to consider whether there has also been a violation of Article 26 of the Covenant.<sup>43</sup>

This aspect of the decision is disappointing. It corresponds to similar lacunae in the above-mentioned European decisions.<sup>44</sup> It is submitted that protection of gay rights on the basis of non-discrimination does serve a useful legal purpose. While the right of adults to enjoy private consensual sex is perhaps adequately protected under Article 17, other claimed gay rights, which are often based on rights of non-discrimination, are not. For example, s 123 of the Tasmanian *Criminal Code* criminalises 'indecent acts between male persons' in public, as well as in private. A right to privacy does not seem to protect one's liberty to, for example, kiss in public. This is confirmed by the HRC's reference, quoted above, to 'sexual activity in private'. Rather, a right to the 'equal protection of the law' as a gay man, seeing as the law does not similarly criminalise

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International Human Rights Norms in Bloemfontein, South Africa, presented by Lord Lester on 3 September 1993, to be published by the Commonwealth Secretariat and Interights in mid-1994.

39 See, eg, General Comment 18, note 19 above, at pp 25-27.

40 See, eg, *Zwaan-de-Vries v Netherlands* (182/84).

41 Paragraph 6.14.

42 Paragraphs 7.8-7.11.

43 Paragraph 11.

44 See, eg, paragraph 70 of *Dudgeon*, note 12 above.

'indecent acts between a man and a woman', or 'indecent acts between females', seems to be involved in the impugment of s 123 in its entirety.<sup>45</sup>

The Swedish HRC member, Wennergren, appended an individual opinion.<sup>46</sup> He found a breach of Article 17(1) in conjunction with Article 26, as the laws, in criminalising only sexual contact between men, 'set aside the principle of equality before the law'. This seems correct.

### *Ramifications of Toonen Views at National Level*

The HRC's 'views' under the Optional Protocol are not legally binding. The Optional Protocol is silent on the question of enforceability, but it is well understood that there is no formal means of enforcing the HRC's views besides public condemnation. Some 'views' have indeed not been implemented by the target State.<sup>47</sup> However, it seems unlikely that the Australian Government would risk damaging its international credibility by failing to remedy the violation of Mr Toonen's rights under the Covenant.

Furthermore, Australia has an international legal duty to implement the Covenant's rights under Article 2(2), and a specific duty under Article 2(3)(a) 'to ensure to any person whose rights or freedoms as herein recognised are violated shall have an effective remedy'. It would be disingenuous for the Australian Government to seize upon the non-binding nature of the *Toonen* decision to deny the existence of a bona fide legal duty to provide Mr Toonen with a remedy.<sup>48</sup> Such an attitude would display a lack of good faith in regard to its duties under the Covenant, rendering Australia's accession to the Optional Protocol, and the Covenant itself, virtually meaningless.

The HRC expressly recommended the repeal of ss 122(a), (c) and 123 of the Tasmanian *Criminal Code*.<sup>49</sup> The Australian Government has

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45 It is perhaps possible to find a right of equality in the exercise of freedom of expression to be involved.

46 See Appendix of the *Toonen* decision.

47 See *Report of the Human Rights Committee: Volume I (1990 Annual Report)*, UN Doc A/45/40, pp 144-5.

48 See W Morgan, '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' (1993) 14 *Aust Yr Bk IL* 277 at 291-2.

49 Paragraph 10.

been given ninety days, from March 31, 1994, to respond to the decision.<sup>50</sup>

### *Possible Tasmanian Response*

In Tasmania, the anti-gay lobby has a more powerful voice than on mainland Australia. All other Australian States have decriminalised consenting adult homosexual sexual acts. Sydney plays host every summer to the Gay and Lesbian Mardi Gras, one of the largest gay celebrations in the world. The ACT, New South Wales, Queensland, South Australia and the Northern Territory have all enacted anti-discrimination laws to protect homosexuals. Commonwealth legislation prohibits discrimination against gay people in employment.<sup>51</sup>

The simplest way in which a remedy for Mr Toonen can be provided is for Tasmania to legislate to repeal the offending sections of the Tasmanian *Criminal Code*. The last attempt to reform the laws regarding homosexuality was in mid-1991, by the minority Labor Government with the support of the Green Independents. However, the reforms were conclusively rejected (by 15 to 4)<sup>52</sup> by the Upper House, the Tasmanian Legislative Council. A broader-ranging anti-discrimination bill was also passed in the Lower House in November 1991, but, unsurprisingly, the Upper House again defeated it.<sup>53</sup>

Recent noises from the Tasmanian conservative Liberal Government indicate that it is unlikely to repeal the impugned laws. Ron Cornish, the Tasmanian Attorney-General, has said: 'We [the Tasmanian Government] won't be legislating for any change.... This was a decision by a faceless group of people telling the Tasmanian Parliament how it should legislate for its citizens. It doesn't hold any water for us.'<sup>54</sup> Cornish emphasised his view that the impugned laws had an 'educative' value:

For some people the law is the last warning against the evils of homosexual sex. To repeal it is to abandon homosexuals and would-be homosexuals to their desires, without any warning that their behaviour may result in misery, disease and death.<sup>55</sup>

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50 Paragraph 12.

51 W Morgan, note 48 above, at 288.

52 M Atkinson, note 24 above, at 206.

53 TGLRC, note 2 above, at p 7.

54 *The Australian*, 'UN Ruling on Gays puts State in Hot Seat', 12/4/94.

55 *The Age*, 'Providing "guidance" in an age of moral uncertainty', 16/4/94.

The Tasmanian Government, on April 6 1994, took a policy decision not to reverse the impugned laws. Even if the Lower House were to pass amending legislation, it remains unlikely that such legislation would gain safe passage through the ever-conservative Upper House.

### *Possible Federal Government Response*

If this belligerent Tasmanian attitude persists, it will be up to the Federal Government to remedy the situation. Indeed, it must be remembered that the Commonwealth is internationally responsible for the violation.

Though the regulation of sexual conduct is clearly part of the residual constitutional power of the States, the Commonwealth could legislate to reform the relevant Tasmanian laws under s 51(xxix) of the Constitution, the external affairs power, as the legislation would be giving effect to an international treaty obligation,<sup>56</sup> namely Articles 2(1) and (3), and 17. The *Australian* paraphrased Michael Lavarch, the Federal Attorney-General: 'the finding was against Australia and not Tasmania and [Lavarch] warned he would act if necessary to exercise the external affairs power of the Constitution to override Tasmania.'<sup>57</sup>

However, Lavarch has expressed a preference for persuading the Tasmanian Government to enact the appropriate legislation itself.

All Australian governments, Federal, State and Territory, have a corporate responsibility to ensure Australia's record on human rights is not tarnished internationally as a result of a particular law within a jurisdiction. In light of the decision, the Tasmanian Government should reassess its position and have regard to Australia's collective responsibilities.<sup>58</sup>

Tasmanian Government submissions to the Federal Government have indicated that the State Government will challenge any Federal Government legislation arising from an adverse HRC decision in

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56 See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, which have confirmed the High Court's broad interpretation of the external affairs power.

57 *Australian*, note 54 above.

58 M Lavarch, 'Why Canberra listens to UN wisdom on human rights', *Australian*, 12/4/94.

*Toonen*.<sup>59</sup> The Tasmanian position regarding States' rights under the Australian Constitution has been supported by the Federal opposition Liberal party.<sup>60</sup> However, considering the prevailing High Court line on the external affairs power, such a challenge would be expected to fail.

It is possible, though unlikely,<sup>61</sup> that amending Commonwealth legislation could be broader in scope than a mere decriminalisation of consensual sex between men. For example, broad-based anti-discrimination legislation for homosexuals could be enacted. However, such legislation may not be supported by s 51(xxix), as it may go further than is required by the ICCPR.<sup>62</sup> The Federal Government may introduce only the minimum reforms needed to implement the fairly narrow parameters of the views, rather than risk defeat in constitutional litigation by introducing wider-reaching reform legislation. Broad legislation could however be supported by s 51(xxix) if it were found to be implementing Australia's duty to 'protect' against discrimination under Article 26.<sup>63</sup> In that case, broad-based anti-discrimination protection for homosexuals would pre-empt future Optional Protocol complaints by gay men or lesbians, and consequent findings of violation.

### *Impact of Toonen on Advancement of Gay Rights on an International Level*

As indicated above, evidence of general Australian tolerance of homosexual lifestyles influenced the HRC's finding of a violation. However, as indicated by the attitude of the Tasmanian Upper House,<sup>64</sup> attitudes do vary markedly within Australian society.

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59 See TGLRG, note 2 above, at p 14. The TGLRG gained access to these submissions after an application under the *Freedom of Information Act*. Tasmanian Premier Groom stated in a Press Conference, on June 14 1993, that Commonwealth intervention over this issue would be 'an extraordinary abuse of the federal system'.

60 Shadow defence spokesman Peter Reith has been particularly outspoken: 'If we allow this to be an issue about gay rights then we are mad. This is an issue about the federal system': see 'Reith Defends States' Rights', *Australian*, 11/4/94.

61 See H Charlesworth, note 10 above, at 432-433.

62 W Morgan, note 48 above, at 292.

63 See, on the existence of a duty to proscribe private discrimination under the Covenant, M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1993) pp 475 - 479; A Bayefsky, note 32 above, at 33; A Lester, note 38 above.

64 For instance, some of its parliamentarians have been on the recent record as calling for the reintroduction of the death penalty, or enforced banishment, for homosexuality: see R Croome, 'Gay Law Reform and the Failure of Consensus Politics', in M Haward and P Larmour, *The Tasmanian*

These differences in attitude are amplified at the international level. Compare, for example, Australian tolerance with the intolerance of many Islamic societies. Therefore, one must ask how the HRC is likely to deal with a complaint of persecution or discrimination by a gay man or woman against a State where, unlike Australia, cultural attitudes are indisputably hostile to homosexuals. While some human rights norms, such as freedom from torture, or a right not to be arbitrarily executed, are readily capable of universal interpretation, others, such as the determination of the legitimacy of alleged discrimination, are made much more difficult by the existence of divergent cultural attitudes.<sup>65</sup>

The European Court and Commission of Human Rights have held that State Parties enjoy a wide 'margin of appreciation'<sup>66</sup> in areas of law or practice where there is no identifiable common practice applied among the Contracting Parties.<sup>67</sup> This approach indicates that the Court's jurisprudence will often lag behind social developments regarding respect for human rights in Europe, rather than enforce a progressive interpretation of the Convention on to its Contracting Parties.

The European Court has found that a wide margin of appreciation exists in respect of the determination of the means necessary to protect public morals, due to divergent States' practice in this area.<sup>68</sup> It must however be noted that the Court in *Dudgeon* implicitly recognised that the emergence of a pattern of European tolerance of homosexuality had diminished the State's margin of appreciation in this area; in light of European social developments, protection of public morality at the domestic level could not justify a total proscription of consensual adult homosexual sex.<sup>69</sup>

Unlike the ECHR organs, the HRC has rarely alluded to the elastic and elusive doctrine of 'margin of appreciation.' In *Hertzberg et al*

*Parliamentary Accord and Public Policy 1989-92* (Federalism Research Centre, 1993) p 102.

65 A Lester, note 38 above.

66 See generally, R St J MacDonald, 'The Margin of Appreciation' in R St J Macdonald, F Matscher and H Petyold (eds), *The European System for the Protection of Human Rights* (Nijhoff, 1993) pp 83-124.

67 See *Rasmussen v Denmark* (1985) 7 EHRR 371, paragraphs 40 and 41. In *Rees v UK* (1988) 9 EHRR 56, para 3, the law regarding treatment of transsexuals was found to be in a 'transitional stage' among Contracting Parties, so this area was largely within the Contracting Parties' margin of appreciation.

68 See *Handyside v UK* (1976) 1 EHRR 737, paragraphs 48, 57.

69 *Dudgeon v UK* (1981) 4 EHRR 149, paragraph 60; see also R St J MacDonald, note 66 above, at p 105.

*v Finland*,<sup>70</sup> the HRC majority found that the censorship by the State's broadcasting authorities of television programmes about homosexuality did not breach Article 19 of the ICCPR (protecting freedom of expression), noting that:

public morals differ widely. There is no universally applicable standard. Consequently, in this respect, a certain margin of discretion must be accorded to the responsible national authorities.<sup>71</sup>

However, *Hertzberg* was a very early decision, and the notion of 'margin of discretion' has never expressly reappeared in an Optional Protocol decision. HRC member Professor Rosalyn Higgins QC has stated that a 'margin of appreciation' doctrine does not operate under the ICCPR these days.<sup>72</sup> Indeed, it would seem that habitual deference to a State's margin of discretion or appreciation by the HRC would be inappropriate in situations where no common international pattern exists, as it is often impossible to identify a common international practice among the highly diverse parties to the ICCPR. The HRC, as a body monitoring human rights on a world-wide scale, confronts more acute cultural differences than does a regional body like the European Court of Human Rights. Consistent resort to a doctrine of 'margin of appreciation' would reduce recognition by the HRC of 'controversial' rights to the lowest common denominator.<sup>73</sup>

Recognition of a right to gay sex entails the recognition by the HRC of a controversial right, as the existence of this right is denied by a large number of the States Parties to the ICCPR. This therefore indicates that a 'margin of appreciation' doctrine does not currently operate to a significant extent within the HRC's jurisprudence.

How then can one anticipate the HRC to deal with gay complainants from anti-gay societies? The *Toonen* decision indicated that local attitudes are capable of being decisive on the question of the 'reasonableness' of certain laws.<sup>74</sup> This could indicate the adoption by the Committee of a 'relativist' approach to controversial rights. This approach may be distinguished from the 'margin of appreciation' approach. The 'margin' doctrine, by ceding a certain amount of

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70 Communication no 61/1979.

71 Paragraph 10 3.

72 During a conference on 'Implementation of the ICCPR in the UK', London, 25 September 1993.

73 A Lester, note 38 above.

74 See also *Sprenger v the Netherlands* (395/90, paragraph 7.4) and *Pauger v the Netherlands* (415/90, paragraph 7.4).

discretion regarding the recognition or non-recognition of a controversial right, generates identical obligations among States Parties regarding the implementation of a given controversial right. Under the 'relativist' approach, determination of the 'reasonableness' of the non-implementation of a controversial right may differ according to the State concerned.

One must question whether a relativist approach, that is respecting predominant cultural attitudes regarding 'rights' which are not universally accepted, is satisfactory. The result could be the fragmentation of the essential universality of fundamental human rights and freedoms.<sup>75</sup> The rights of individuals would vary according to their location. Why should, for example, an Algerian homosexual have fewer rights than an Australian homosexual? Should the HRC not lead the way in promoting greater respect for gay rights on an international scale, rather than sanction cultural bigotry?

On the other hand, homosexuality is viewed as fundamentally wrong in some States, and any HRC view condemning intolerance could be viewed by the target society as an attack on their culture by a remote international body.<sup>76</sup> It does seem doubtful that such a decision would actually be implemented. Rather, domestic disrespect for the HRC could be provoked.

The *Toonen* decision (apart from Wennergren's technically different, but largely concurring, individual opinion) was, perhaps surprisingly, unanimous. In general, Islamic, Catholic and Caribbean States are intolerant of homosexuality. Nevertheless, experts from Egypt, Jordan, Ecuador, Venezuela, and Jamaica agreed that the Tasmanian laws violated Toonen's civil rights. However, in any similar future communication complaining of laws similar to the impugned Tasmanian legislation against a State Party with a 'less tolerant' population, it unfortunately seems unlikely that a similar unanimous opinion would emerge. It is submitted that some members would adopt a 'relativist' approach. Thus, a vehemently anti-gay State could use a vindicating opinion, even a minority opinion, which accepted their anti-gay laws as justifiable, as bases for denial of ICCPR liability. However, it also seems likely that some HRC members would take a universalist approach to the implementation of controversial rights such as the right to consensual homosexual sex; they would therefore follow the *Toonen* precedent regardless of the respondent State concerned. These opinions

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75 A Lester, note 38 above.

76 Indeed, the Committee's decision has provoked attacks on its credibility from Tasmanian politicians, such as State A-G Ron Cornish.



would at least record acceptance and recognition of the universal rights of gay people by members of an expert human rights treaty body.

### *Toonen's Implications for Further Advancement of Domestic Gay Rights*

Does the *Toonen* decision have implications for the compatibility with the Covenant of other laws in Australia which are discriminatory towards homosexuals? Examples of such laws are s 78K of the *Crimes Act* (NSW) 1900, which prescribes different ages of consent for men (eighteen years) and women (sixteen years). Penalties for breach of the NSW age of consent laws are potentially heavier for men having sex with men than for other sexual relationships involving minors.<sup>77</sup> Section 23 of the *Criminal Code* (WA) renders it 'contrary to public policy to encourage or promote homosexual behaviour and the encouragement or promotion of homosexual behaviour shall not be capable of being a public purpose'. The promotion or encouragement of homosexual behaviour, in primary or secondary schools, is rendered unlawful by Section 24. These Western Australian provisions seem to convey government approval of discrimination against homosexuals. Furthermore, lesbian and gay relationships have no legal status in Australia, so no legal rights automatically flow from such relationships. Heterosexual partners in New South Wales, for example, have better legal rights regarding the death of a partner, the distribution of an intestate estate, and immigration.<sup>78</sup>

The opinion of the HRC can be viewed as revealing a fairly enlightened attitude towards gay rights. However, in common law terms, the ratio of the decision dealt only with criminalisation of consensual sexual relations between adult men. It does not deal with equalisation of the age of consent, or rights of marriage, or any other 'gay rights'. Only a new communication alleging violations of such rights will reveal the extent to which HRC members are willing to recognise other gay rights.

The ECHR organs have dealt with complaints about the infringement of other claimed gay rights. In *Johnson v UK*,<sup>79</sup> the applicant complained about the difference between the age of consent for

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77 See various provisions of s 78.

78 See generally, Lesbian and Gay Rights Service, *The Bride Wore Pink*, Discussion Paper (1993) pp 7-10.

79 (1986) 47 DR 72.

gay men, then set at 21 years of age,<sup>80</sup> and the 16 years prescribed for heterosexuals and lesbians. He also complained that male homosexual acts could only be committed with one partner in private, a law not applied to lesbians and heterosexuals. The European Commission of Human Rights found neither complaint admissible. Regarding possible discrimination, the Commission found that the differences in treatment between gay men on the one hand and lesbians and heterosexuals were 'objective and reasonable', due to 'the need to protect the individual - particularly the young and vulnerable.'<sup>81</sup> The Commission accepted State party contentions that 'heterosexuality and lesbianism do not give rise to comparable social problems'. It must be noted that the prohibition on public displays of 'indecent practices between males' by the impugned s 123 of the Tasmanian *Criminal Code* amounts to the same type of law as the second law challenged in *Johnson*.

In *B v UK*,<sup>82</sup> the applicant complained about the total criminalisation of homosexual acts within the armed forces. The Commission, however, accepted 'that homosexual conduct by members of the armed forces may pose a particular risk to order within the forces which would not arise in civilian life. In this respect it refers to the evidence given by the Ministry of Defence to the House of Commons Select Committee ..., and accepts that the considerations outlined there are legitimate.'<sup>83</sup> The Ministry of Defence evidence<sup>84</sup> cited such considerations as the fact that members of the armed forces live in closed communities, the need for absolute trust within and between all ranks, the security dangers caused by the risk of blackmail for gay officers, and the danger of senior gay officers abusing their authority and forcing junior officers into homosexual acts. This evidence parroted old-fashioned, homophobic views. The risk of disorder in the forces revealed in such evidence seemed to be generated by discriminatory attitudes towards homosexual conduct, rather than by the conduct itself.<sup>85</sup> The Commission should be protecting individuals against such prejudices, rather than legitimising its perpetuation.

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80 The Criminal Justice and Public Order Bill 1994 will lower the age of consent for gay men from 21 to 18. As ages of consent will not be equalised at 16, a new challenge to the UK age of consent laws is being taken to Strasbourg in the hope that attitudes have changed since *Johnson*.

81 *Johnson v UK* (1986) 47 DR 72 at 78; See also *X v UK* (10389/83).

82 (1983) 34 DR 68.

83 *Id* at 72.

84 *Id* at 70.

85 P van Dijk and G van Hoof, *Theory and Practice of the European Convention on Human Rights* (2nd ed, Kluwer Law and Taxation publishers, 1990) p 375.

In *X and Y v UK*,<sup>86</sup> the applicants, a couple in a stable gay relationship, claimed that the deportation of Y constituted a breach of their right to respect for their family life under Article 8. The Commission found that, '[despite] the modern evolution of attitudes towards homosexuality, ... the applicants' relationship does not fall within the scope of the right to respect for family life ensured in Article 8'.<sup>87</sup> This view, reaffirmed recently by the Commission in *Kerkhoven and Another v the Netherlands*,<sup>88</sup> effectively denies gay partners 'family rights' such as the right to marry or adopt children.

The attitudes of the Strasbourg organs indicate that the *Toonen* decision, thin end of the wedge though it is, could represent the pinnacle, for the time being, of recognition of gay rights at an international level.

### *Conclusion*

The *Toonen* decision represents the first juridical recognition of gay rights on a universal level. The HRC, with its diverse membership from all parts of the world, decided unanimously that the right of Tasmanian adult gay men to have sexual relations with each other was protected by the Covenant's guarantee of privacy. This decision demonstrates the dynamism of the Covenant's guarantees; it seems unthinkable that the Tasmanian Government's arguments of moral justification would have been dismissed in 1966, when the ICCPR was opened for ratification. The HRC's progressive approach to the interpretation of Article 17 matches that under the ECHR, but may be contrasted with the US Supreme Court majority's conservative approach to the interpretation of the US Constitution in *Bowers v Hardwick*.<sup>89</sup>

The decision seems likely to signal the end of the criminalisation of sexual relations between men in Tasmania, whether amending legislation is introduced by the Tasmanian Government, which at this stage seems unlikely, or by the Federal Government utilising its external affairs power under the Constitution.

It is uncertain the extent to which *Toonen* actually advances gay rights on a universal level. The same laws as were impugned in Tasmania could be upheld in a State party where local attitudes are

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86 (1983) 32 DR 220.

87 Id at 221.

88 [1993] Fam Law 162.

89 Note 15 above. Note Chief Justice Berger at 478 US 186, 197: 'To hold somehow that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.'

ardently homophobic. Similarly, it is uncertain whether other possible gay rights, such as non-discrimination in general, the right to marry, or generally to enjoy a family life, will be recognised by the HRC. Jurisprudence under the ECHR indicates that homosexuals have a long way to go before overcoming entrenched universal bigotry, and having their rights truly respected on the international stage. However, one cannot deny that *Toonen v Australia*, especially considering its unanimous endorsement by the Human Rights Committee, represents an important step towards such a goal.<sup>90</sup>

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90 See the *Australian*, 11/4/94, 'UN gay stance will reform other countries too: judge', reporting comments of the President of the NSW Court of Appeal, Justice Kirby: 'United Nations pressure on Tasmania to reform its anti-gay laws would compel other countries to fall into line ...'