Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) Bill 1994

Wayne Morgan*

On 21 September 1994, the Attorney-General introduced the Human Rights (Sexual Conduct) Bill 1994 (Cth) ('the Bill') into the House of Representatives. This Bill is the Federal Government's 'solution' to the problem of Tasmanian 'anti-gay' laws, the UN Human Rights Committee ("the UN Committee") having recently decided that these laws breached Australia's human rights obligations and should be repealed. I intend to analyse the Bill from the perspective of the Tasmanian Gay and Lesbian Rights Group. I argue that the Bill is practically and ideologically flawed and that it fails to comply with Australia's international obligations to protect human rights.

Background to the Bill

In March this year the UN Committee expressed the view that sections of the Tasmanian criminal code outlawing 'unnatural sexual intercourse' and 'indecent practice between male persons' should be repealed.[1] The Committee decided this after declaring that these laws breached the right to privacy set out in Article 17 of the International Covenant on Civil and Political Rights ("ICCPR").[2] The case was taken to the UN in 1991 by the Tasmanian Gay and Lesbian Rights Group (TGLRG), Nick Toonen being the official author of the Communication.[3]

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* BA, LLB (Hons), LLM (Colum), Lecturer in Law, University of Melbourne, Legal Adviser to the Tasmanian Gay and Lesbian Rights Group.

1 United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 (31 March 1994). Section 122 of the Tasmanian Criminal Code provides:

Any person who—

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

(b) has sexual intercourse with an animal; or

(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.

2 The International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (1967). For Australia's instrument of Accession to the Protocol see ATS 1991 No 39.

3 For more background on the Tasmanian case see R Croome 'Australian Gay Rights Case Goes to the United Nations' (1992) 2 *Australian Gay & Lesbian Law Journal* 55; W Morgan 'Sexuality and Human Rights' (1993) 14 *Australian Year Book of International Law* 277; W Morgan 'Identifying Evil For What It

Since the UN Committee formed its views, the Tasmanian government has consistently refused to repeal the laws. In May, the federal Attorney-General held talks with the Tasmanian government which failed to persuade that government to abide by our international obligations. Following this, the Attorney announced plans to draft a federal bill to override the Tasmanian laws. The Sexual Conduct Bill is the result.

The Bill's substantive provisions are found in one clause. Clause 4 provides:

> 4(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.
> (2) For the purposes of this section, an adult is a person who is 18 years old or more.

The legal effect of the Bill: Its failure to produce an explicit inconsistency with the Tasmanian laws

The constitutional validity of the Bill is beyond question. Indeed it was drafted on the basis of constitutional advice surprising for its (almost paranoid) conservative approach.[4] The Bill is clearly an enactment of an international obligation which does not contravene any of the implied limits flowing from federalism. It is therefore clearly constitutional under the external affairs power.[5] It is worth noting that apart from an initial rhetorical flourish from the Victorian Premier, no State Government has outlined constitutional objections to the Bill.

When passed,[6] the Bill will enact a new federal right to privacy in relation to sexual conduct. It will provide a potential basis on which to invalidate any State law which is inconsistent with this right, relying on section 109 of the Constitution. The Bill thus has a potential impact on laws regulating sexual conduct in Australian jurisdictions other than Tasmania. Most notably, the Bill has an impact on laws which specify a higher age of consent for gay men, or a higher age of consent for anal sex.[7] However, laws regulating sexual conduct will

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Is: Tasmania, Sexual Perversity and the United Nations' (1994) 19 *Melbourne University Law Review* 740.

4 For a journalistic summary of the advice, see L Oakes 'Lavarch outwits the high and mighty' *The Bulletin* 27 September 1994.

5 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 (the *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).

6 The federal Coalition decided not to oppose the Bill (see 'Coalition support for gay law' *The Age* 23 September 1994, 1). However, two members of the National Party forced a division in the House of Representatives, leading to a vote of 114 to 4 in favour of the Bill (see 'Two resign as MPs defy Downer on privacy vote' *The Australian* 20 October 94, 1). At the time of writing, the Bill had not been debated in the Senate.

7 Higher ages of consent for sex between men or for anal sex exist in NSW, Qld, WA and the NT. Note however, that the new federal right could only be used as a basis to attack the WA law, which sets the age of consent for sexual penetration of a male by another male at 21. This is because clause 4(2) of the Bill provides that the right can only be relied upon by someone over 18. Thus, a further

only be invalidated, if a court decides them to be an 'arbitrary interference' with private sexual conduct.

Thus, what the Government's Bill achieves is *very limited*. As a *partial* enactment[8] of the right to privacy, the Bill takes a very small step towards doing what the Federal Government has had an obligation to do since 1980: make the rights set out in the ICCPR enforceable in Australian domestic law. It does not, however, provide a remedy for the violation of rights declared by the Committee in the UN Toonen case.

The Government could have provided such a remedy by drafting a provision stating that sex between men and sex between women was not to be subject to criminal penalty (appropriately phrased so as to preserve crimes such as rape, etc). This would have amounted to a federal law clearly inconsistent with the Tasmanian laws. It would have made clear that the Tasmanian laws were invalid without the necessity of seeking a court ruling. Instead of taking this principled stand, the Federal Government has passed the buck. The Tasmanian laws will not be overridden until a court (most probably the High Court) declares them to be an 'arbitrary interference' with privacy. The Bill provides an *avenue* by which the Tasmanian laws *may eventually* be declared invalid, nothing more. The weakness of the Bill has even led the Tasmanian Government to claim that there is no inconsistency between the Bill and the Tasmanian laws because the latter do not amount to an 'arbitrary interference with privacy'!

Because it will only invalidate state laws which are an 'arbitrary' interference with privacy, the Bill leaves gay and lesbian rights in a painfully uncertain position. We will not know what 'arbitrary' means for the purposes of Australian law until an Australian court, indeed the High Court, interprets it. Although clause 4 directs an interpretation consistent with Article 17, this does not preclude an Australian court from adopting different reasoning to the Committee, nor from coming to different conclusions. This danger is increased if any case is first heard by a local court in Tasmania, or any other jurisdiction where laws might be attacked on the basis of the new right to privacy. Although the UN Committee has already declared the Tasmanian laws to be an arbitrary interference with privacy, these views are not binding on Australian courts. Thus, the Tasmanian laws will remain operative until the High Court declares otherwise. If such a declaration can only be sought as a defence against a prosecution, it may be some distance in the future, if at all. In the meantime the Tasmanian Government and others in Tasmania will continue to rely on the Tasmanian criminal code to justify their homophobia (see below).

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problem with the Bill is that it will not provide an avenue to attack discriminatory ages of consent in the other States and Territory mentioned, despite the fact that (in general) the heterosexual age of consent in those jurisdictions is 16, while the age of consent for gay male sexual conduct is 18.

8 Note that the long title of the Bill is misleading. It states that the Act is to 'implement Australia's obligations under Article 17 of the International Covenant on Civil and Political Rights'. Being restricted in its application to sexual conduct, the Act will fall far short of implementing the *general* privacy right in Article 17.

If a case is heard by the High Court, there can be little doubt the Court will *ultimately* rule that the Tasmanian laws are invalid. The fact that the Tasmanian laws have not been enforced for some time against gay men engaged in sex in private will not preclude either a challenge to the validity of the laws or a declaration by the High Court that the laws are invalid. The *mere existence* of the laws constitutes an arbitrary interference with privacy, as the UN Committee made clear. Their *mere existence* amounts to a continuing breach of human (gay and lesbian) rights.

The Bill is thus faulty on a practical level because it does not produce an explicit inconsistency with the Tasmanian laws. Ideologically, the Bill is also at fault because it fails to take the rights of gay men and lesbians seriously.

The Bill isn't serious about gay and lesbian rights

The Bill does not adequately implement Australia's obligations under the ICCPR. In the Toonen case, the UN Committee formed the view that Australia has an obligation not to discriminate against anyone on the basis of their sexual orientation. The Government's Bill fails to address the discriminatory nature of the Tasmanian laws.

From the beginning of their fight for repeal, members of the TGLRG have strongly argued that the real harm done by these laws lies in the message they send about the status of lesbians and gay men in Tasmanian society. The issue is not whether gay men are prosecuted for having sex in their bedrooms. The issue is the clearly inferior status these laws place on gay and lesbian Tasmanians. The Tasmanian Government and individuals within Tasmania regularly cite that 'homosexuals' are 'criminals' to justify discriminatory practices.

For example, just after the Bill was released, Mr John Beswick, Tasmanian education minister, was asked in Parliament why a group opposed to gay law reform, TAS-ALERT, had been permitted to distribute its literature in Secondary Colleges. This permission had been denied to material supporting reform. He justified this discrimination by stating

> quite clearly there is a very real difference in this State between the promotion of activities which are contrary to the laws of the State and the promotion of a view which is opposing those activities.

The Federal Government claims it has no constitutional power to protect gay men and lesbians from discrimination, and that the Toonen case does not alter this. This claim is false. The federal government is choosing which of Australia's obligations (as declared by the UN Committee) it will enact, largely on the basis of political expediency. As noted above, the UN Committee expressed the view that the ICCPR prohibits discrimination against lesbians and gay men. Passing a federal law which dealt with the discriminatory aspects of the Tasmanian criminal code would thus be a valid constitutional exercise of the external affairs power.

Leaving aside the question of the Bill's failure to address the issue of discrimination, it cannot even be said that the bill adequately protects the privacy rights of gay men and lesbians. Clause 4(1) states "[s]exual conduct involving only consenting adults *acting in private . . .* " (emphasis added) is not to be subject to arbitrary interference. The words emphasised clearly give clause 4 a geographical focus. Sexual conduct *in a private place* is protected. This mischaracterises the right to privacy set out in Article 17. Article 17 protects private choice rather than private place, and the UN Committee's jurisprudence makes this clear.[9] The Government's draft does not protect the private choices of lifestyle made by gay men and lesbians. Indeed, the geographical focus of clause 4, its emphasis on gay and lesbian rights only in a 'private place', could be analogised to a statement that our rights will only be protected if we 'stay in our closets'. This reading is reinforced by the fact that neither the Bill nor the explanatory memoranda even mention the words 'gay' or 'lesbian', despite the fact that we are the ones who suffer discrimination every day because of laws like those in Tasmania. In this way the Bill continues the public *silencing* of any *other* sexuality.

Indeed, in this respect and others the Bill and its explanatory memoranda reinforce some of the homophobic myths prevalent in Australian society. Whilst maintaining a silence about gay and lesbian sexuality, the explanatory memoranda are at great pains to point out that the Bill will have no impact on laws dealing with paedophilia, incest, prostitution, sadomasochism or bestiality. It gives the impression that gay and lesbian sexuality has been lifted from this class of 'sins' with which it is 'naturally' associated. Such an ethos surrounding the Bill hardly amounts to taking gay and lesbian rights seriously.

Conclusion

The Human Rights (Sexual Conduct) Bill does not achieve the stated goals of the Attorney-General. It is an exercise in political expediency and is practically flawed. It does not demonstrate any true commitment to respecting gay and lesbian rights, nor to abiding by Australia's international obligations.

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9 My thanks to Jamie Gardiner for pointing this out. See the UN Committee's general Comment on Article 17, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1 (1992), 20.