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# GAYS IN PRIVATE: THE PROBLEMS WITH THE PRIVACY ANALYSIS IN FURTHERING HUMAN RIGHTS

## INTRODUCTION

IN June 1991, the Tasmanian Legislative Council forthrightly rejected the State Labor government's bill to decriminalise adult, consenting, male homosexual acts occurring in private.[1] The Hon George Brookes MLC stated:

> I believe we ought to be ... tightening up the laws, making them a little more draconian, and maybe we would influence a few of them to take the plane north where it has been decriminalised. Do not let them sully our state with their evil activities.[2]

In criminalising male homosexuality, Tasmania stands alone in Australia, and contrary to the consensus of modern western world opinion.[3]

Thus, on 25 December 1991, Tasmanian activist Nicholas Toonen appealed to the United Nations Human Rights Committee (the Committee) for a ruling as to whether Tasmania's criminal sanctions applying to all private, consenting male homosexual sexual activity are in violation of rights guaranteed by the International Covenant on Civil and Political Rights: the right to privacy and the right to equality before the law guaranteed in Article 17, Article 17 in conjunction with Article 2.1 and Article 26.[4]

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1 Hill, "Rethinking Gay Laws" in *The Bulletin*, 20 April 1993 p20.

2 Montgomery, "Private Lives, Public Hysteria" in *The Weekend Australian*, 3-4 April 1993 at 20 referring to Tas, Parl LC, *Debates* (2 July 1991) Vol 8 at 1246.

3 Atkinson, "Homosexual Law Reform" (1992) 11 *UTasm L Rev* 208.

4 The articles of the *International Covenant on Civil and Political Rights* allegedly violated are:

This was the first Australian communication under the First Optional Protocol to the Covenant.[5] The Optional Protocol allows individual Australians the right to communicate directly to the Committee if they claim Australia has breached its obligations under the Covenant.

The Committee has since made its ruling as to merits.[6] It was the Committee's finding that Mr Toonen's rights were violated under Articles 17 and 2.1 of the Covenant. Accordingly, the immediate repeal of the challenged laws was required. However, despite the importance of the Committee's ruling, the majority of the Committee did not consider it necessary to determine whether there had also been a violation of Article 26 of the Covenant.[7]

The Toonen ruling was a step forward in the acknowledgment of human rights. The ruling fails to establish, however, the appropriate springboard

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ARTICLE 17

(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.

ARTICLE 17 IN CONJUNCTION WITH ARTICLE 2.1

(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.

(1) Each State Party to the present Covenant undertakes to respect and to ensure 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.

ARTICLE 26

All persons are equal before the law and 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 any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

5 Australia's accession to the First Optional Protocol was 25 September 1991 with it taking effect from 25 December 1991. For a full discussion of this, see Charlesworth, "Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights" (1991) 18 *MULR* 428.

6 March 1994.

7 *Toonen v Australia* (Communication No 488/1992) at 12.

from which those human rights can be naturally extended. The Committee premised its decision on the right to protection from unlawful or arbitrary interference with one's privacy. This article will argue that the privacy analysis does not question, and in certain respects supports, the belief that homosexuality is inherently wrong.[8]

## THE PRIVACY ANALYSIS

Toonen's first ground for challenging the Tasmanian law was Article 17 and Article 17 in conjunction with Article 2.1 which provide a right to equal protection from unlawful or arbitrary interference with a person's privacy.[9]

The Tasmanian Criminal Code applies to activity in both the public and private sphere.[10] It was argued that the bringing of private activity into the public domain is in violation of the right to privacy.[11] Moreover, as the police have the power to enter a private domicile on the suspicion that such offences are taking place to arrest, charge and detain the men involved, the enforcement of the laws is also a violation of the privacy protection.[12]

The European Court of Human Rights and the European Commission of Human Rights have held that private, consensual male homosexual sexual activity is a part of "private" life, interference with which requires a

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8 This is consistent with the views of Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447.

9 *Toonen v Australia* at 19.

10 The challenged law is the *Criminal Code Act* 1924 (Tas) (as amended 1987) ss122(a), 122(c), 123:

s122 Any person who-
(a) has sexual intercourse with any person against the order of nature;
(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.

s123 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 practices between male persons.

11 Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447.

12 As above.

"pressing social need". *Dudgeon v UK*[13] and *Norris v Ireland*[14] are the relevant cases. If the interference cannot be justified, it will be deemed a breach of Article 8 of the European Convention of Human Rights. Article 8 provides that:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as 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

The United Kingdom argued in *Dudgeon* that such criminalisation in Northern Ireland was necessary to safeguard public morality and to protect the interests of persons, such as adolescents, from sexual exploitation.[15] The Court, however, gave a very strict interpretation to the concept of necessity, commenting that:

> Firstly, "necessary" in this context does not have the flexibility of such expressions as "useful", "reasonable" or "desirable" but implies the existence of a "pressing social need" for the interference in question ... [T]he notion of "necessity" is linked to that of a "democratic society". According to the Court's case law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" - two hallmarks of which are tolerance and broadmindedness - unless, amongst other things, it is proportionate to the legitimate aim pursued.[16]

With this analysis, the Court paid deference to the anti-homosexual sentiment of public opinion in Northern Ireland, but was not prepared to find that it was "necessary in a democratic society" purely for that reason. Indeed, the Court in determining the margin of appreciation, balanced the anti-homosexual sentiment (although it questioned the breadth of the United

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13 (1981) 4 EHRR 149.
14 (1989) 13 EHRR 186.
15 *Dudgeon* at 19-20.
16 At 21-22.

Kingdom's assessment of such[17]) with the liberalised attitude that existed throughout Europe to homosexuality.[18] Through such a balancing approach it narrowed significantly the discretion of the government. Accordingly, it found for Mr Dudgeon, stating that

> 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 life to such an extent.[19]

Toonen's communication argued the same point. Charlesworth suggested that the European Court relied on notions of a European consensus regarding sexual orientation, whereas the diverse cultural background of parties to the International Covenant may make the Committee less willing to identify sexuality as at the centre of private life, and to consider restrictions upon it arbitrary.[20] However, the Committee unanimously supported the reasoning of the European Court. There was no dispute that adult consensual sexual activity in private is covered by the concept of 'privacy'. Nor was there any dispute that Mr Toonen's privacy had been interfered with, for although not having been prosecuted or criminally investigated, his predisposition to commit prohibited sexual acts by reason of his homosexuality meant he was directly affected by the legislation.

The pivotal question was whether there had been an unlawful or arbitrary interference with Toonen's privacy. The Committee, in its General Comment on Article 17, stated that 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 ... reasonable in the particular circumstances."[21] The concept of reasonable interference with privacy is premised on a balanced and objective criteria: any interference must then be proportionate to the aim pursued.

The Tasmanian authorities submitted that the retention of the challenged laws was partly a reasonable control measure to curb the spread of

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17 At 22.

18 As above.

19 At 24.

20 Charlesworth, "Internationalising Human Rights: Australia's Accession to the First Optional Protocol" (1992) *Centre For Comparative Constitutional Studies* 51 at 59.

21 *Toonen v Australia* at 6.

HIV/AIDS. However, the Committee noted that the criminalisation of homosexual practises tends to impede public health programmes, acknowledging the Australian National HIV/AIDS Strategy which makes this point.[22] Secondly, the Committee observed there was no causal nexus established to show that continued criminalisation of homosexual activity was a panacea to the spread of HIV/AIDS.[23]

Tasmania also argued that such laws were necessary for the protection of public morality. In answer, the Committee applied the European Court of Human Right's reasoning.[24] The Committee noted that with the exception of Tasmania, all laws criminalising homosexuality in Australia had been repealed; that in Tasmania there was much debate as to whether the laws should also be repealed; and that as the laws were not currently enforced they could not be seen as essential to the protection of Tasmanian morals.[25]

A majority of the Committee stated that in finding a violation of rights under Articles 17 and 2.1 it did not view it necessary to consider whether there had also been a violation of Article 26 of the Covenant. Human Rights Commissioner, Bertil Wennergren, disagreed. He contended that the Tasmanian laws in distinguishing between heterosexuals and homosexuals, while criminalising sexual contacts between consenting men without at the same time criminalising such contacts between women, set aside the right of equality before the law. The fact that the challenged laws were not currently enforced should not be seen to mean that homosexual men in Tasmania have effective equality under the law: the designated behaviour remains a criminal offence.[26] Equal protection of the law refers to the substance of the law as well as its application. Wennergren went much further than the rest of the Committee. Importantly, however, it is this that can provide the means by which homosexual persons who are victims of discrimination can seek legal redress. The privacy analysis does not provide such a mechanism.

## PROBLEMS WITH PRIVACY

In essence, the privacy test is a cost benefit analysis. It weighs the cost of intruding into the private realm against the public benefit of health or morals, as examples. However illogically based anti-homosexual sentiment

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22 *Toonen v Australia* at 11.
23 As above.
24 At 12. Note particularly the similarity of the reasoning of the European Court in *Norris* and *Dudgeon* referred to.
25 As above.
26 At 14.

may be, to defer to the public morals benefit is a subscription to this sentiment. The Human Rights Committee have responded to such arguments: *Hertzberg v Finland*.[27] This case was raised under Article 19 of the Covenant, which deals with the right to freedom of expression. Article 19 (3) restricts the right to freedom of expression to the extent that protection can be put in place for public health or morals reasons. The Finnish Penal Code reflects this in criminalising the public incitement of indecent behaviour between same sex persons. The Finnish government's censoring of certain media broadcasts dealing with homosexuality was viewed necessary to protect public morals. Agreeing, the Committee stated, "that public morals differ widely. There is no universally common applicable standard."[28] A relative standard of human rights was thus applied varying according to the social values of the community under consideration.

Essentially, this is the problem with the privacy analysis. It stops at privacy. It can do nothing in relation to discrimination in areas including employment, expression and association. Helfer contends that the privacy protection is given paramountcy in the hierarchy of rights, so that other rights may be undermined by comparison.[29] The European Court of Human Rights in *Dudgeon* stated: "The present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of public authorities can be legitimate."[30] That same Court, however, had no problem in ruling that the State interest did outweigh the privacy interests of males under the age of 21. Kane forcefully argues that:

> the right of privacy only looks to one manifestation of intolerance without addressing the root of that prejudice. ... The compelling State interest was deemed to be the protection of those males from the immorality of homosexual relations. So while the right to privacy serves to limit the degree of State interference with sexual expression, it accepts that some degree of interference is warranted

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27 Communication No 14/61 as discussed in Charlesworth, "Internationalising Human Rights"

28 As above.

29 Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights" (1990) *NYULR* 1044.

30 *Dudgeon* at 149.

> because of the perceived immorality of homosexual relations.[31]

Such a legal dichotomy has no basis in fact. As Helfer points out decriminalisation does not increase the amount of homosexuals, nor does it erode moral standards. In addition, concurring views of experts show that adult homosexuals pose no greater threat of harm to minors than do adult heterosexuals. Further, there is no danger that adolescents will be lured to homosexuality by being exposed to it, as sexual identity is fixed early in life.[32]

A favourable Article 26 ruling, however, would eliminate this legal dichotomy. In this respect, the reasoning of the dissenting member of the European Commission of Human Rights who found a violation of Article 14 (corresponding to Article 26) in Northern Ireland's prohibition of all male homosexual relations is compelling:

> [T]he prohibition ... stigmatises homosexuality. ... By doing so the State, which has the duty to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention, supports and intensifies old and deep-seated sentiments of aversion and fear which have proved to be unjustifiable and without factual ground. ... *By maintaining these provisions the State discriminates strongly against this group of the population in comparison with heterosexual adults. ... The difference amounts to a clear inequality of treatment in the enjoyment of the right in question*, which is a fundamental aspect of this case.[33]

Arguably sexual self determination is as fundamental a freedom as any other human right.[34] By recognising homosexual persons as equal under the

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31 Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447 at 467.

32 Helfer, "Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights" (1990) *NYULR* 1044 at 1096.

33 Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447 at 479, referring to *Dudgeon v UK* (1980) Application No 7525/76 (Dudgeon 1) Eur Comm HR 1 at 40 (separate opinion of Mr Polak) (emphasis added).

34 Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447 at 479, referring to *Dudgeon v UK* (1980) Application No 7525/76 (Dudgeon 1) Eur Comm HR 1 at 40 (separate opinion of Mr Polak) (emphasis added).

law, the State would divorce itself from its prejudice regarding homosexual persons. In recognising homosexual persons as equal under the law, the State can protect them from the societal discrimination they confront. The privacy analysis is not equipped to do this.

## CONCLUSION

Kane acknowledged that it was a landmark decision of the European Court to uphold the Commission in *Dudgeon*.[35] In this change of position for homosexual persons under the Convention, he states there had been a major step forward in the advancement of human rights.[36] The same can be said of the Human Rights Committee ruling in favour of Mr Toonen.

The problem of decisions such as these is that they provide no useful framework in extending human rights for homosexual persons. The decisions rely exclusively on notions of privacy. Reliance on the privacy test requires no challenge to anti-homosexual beliefs. In so doing, it merely promotes a heightened right in protecting privacy, but fails to address fundamental concepts of equality and subtly colludes with the anti-homosexual sentiment. Such collusion appears in the weight given to this sentiment. Consequently, it leads to decisions that actively discriminate against homosexual persons.

What is necessary to guarantee human rights for homosexual persons is a recognition of their right to equal protection under the law. This pierces the veil of several centuries of prejudice which underlies the State's reasons purporting to justify the differential treatment of heterosexual and homosexual persons.[37] Justice Henchy stated:

> [T]he fear of prosecution or of social obloquy has restricted him in his social and other relations with male colleagues and friends: and in a number of subtle but insidiously intrusive and wounding ways he has been restricted in or thwarted from engaging in activities which heterosexuals take for granted as aspects of the necessary expression of their human personality and as ordinary incidents of their citizenship.[38]

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35 at 485.

36 As above.

37 At 473.

38 Kane, "Homosexuality and the European Convention on Human Rights: What Rights?" (1988) 11 *Hast Int'l & Comp L Rev* 447; referring to the dissenting

Equal protection of the law for homosexual persons establishes the framework to counter unfair treatment. It will deal more effectively with discrimination and properly advance human rights to all.

judgement in the Irish Supreme Court Decision in *Norris v Ireland* 13 EHRR 186 at 189, per Henchy J.