Sexual (mis)conduct

Rodney Croome

The High Court and gay law reform in Tasmania.

'It's not whether you win or lose, but whether you appear to win.' This Machiavellian advice was given to me several years ago by a gay man who has made his career kicking heads on behalf of the Australian Labor Party's most powerful men and women. I don't know if this man had a role in framing the Commonwealth's response to last year's United Nations Human Rights Committee (UNHRC) decision condemning Tasmania's anti-gay laws as a breach of the right to privacy. But the same 'form over substance' mentality delivered us that empty vessel called the *Human Rights (Sexual Conduct) Act 1994* (Cth).

It was inevitable that a UNHRC decision condemning Tasmania's anti-gay laws (ss.122 and 123 of the *Criminal Code*) would polarise opinion. The decision prompted almost universal disapproval of the challenged Tasmanian laws within Australia (as well as a very unfortunate resurgence of mainland antagonism to anything Tasmanian). At the same time, and in an attempt to keep the nascent Tasmanian branch of the National Party out of State Parliament, the Tasmanian Liberal Government warned of a High Court challenge (and even secession) if the Commonwealth took action. Within weeks of Geneva's decision a biting boycott of Tasmanian produce had been launched while the other conservative State Governments (Victoria, Western Australia and South Australia) had agreed to fight federal action to the end. The Commonwealth had to act, but to directly invalidate a State criminal law would involve it in yet another protracted pre-election High Court battle with the States.

The Commonwealth's answer to these circumstances was legislation which forbade any arbitrary interference with the right to sexual privacy, but then balked at defining the situations in which this right applies by failing to define the meaning of 'arbitrary'. In effect the Commonwealth legislation would do nothing more than provide a defence in court for any gay man arrested under Tasmania's anti-gay laws. This allowed the Government to appear to have fulfilled its treaty obligations without directly invalidating any State legislation.

According to Attorney-General Michael Lavarch, the Government had no legal and constitutional option but to entrench a general right to sexual privacy and hope that the courts would look generously on the Government's intentions whenever the right was invoked by aggrieved citizens. Any other response to the Tasmanian decision would be open to challenge in the High Court. But what Mr Lavarch didn't say was that any such challenge would be likely to fail. According to reliable sources Cabinet considered the direct invalidation of Tasmania's anti-gay laws as one of two possible responses to the UNHRC decision, the other being the *Human Rights (Sexual Conduct) Bill*. Cabinet received advice that both options would be legally and constitutionally sound. Its choice was purely a matter of politics.

The mainland conservative States were pleased with the Government's decision and withdrew from the Tasmanian gay law reform debate. The Tasmanian Attorney-General, Ron Cornish, crowed that the Commonwealth's Bill is 'political window dressing. It doesn't

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make our law invalid and it doesn't affect the way it has applied for decades'. On the other hand, the Tasmanian Gay and Lesbian Rights Group (TGLRG) expressed disappointment at Canberra's minimal response. Under the *Human Rights (Sexual Conduct) Bill* Tasmanian gay men could still be intimidated and harassed by the police on the basis of their criminality and the Tasmanian Government could still justify discriminatory public policy on the basis that 'homosexuality is against the law'. For this situation to cease through the activation of the sexual conduct law a gay man would have to be arrested, dragged through the court system and invoke the Commonwealth law as a defence — an unlikely and harrowing event.

An unusual ally, the Catholic Church, gave the TGLRG an opportunity to fill the gaps in the Sexual Conduct Bill. As the Senate was about to begin debate on the legislation the Church flew into a typical clerical fluster over the Bill's possible legitimisation of prostitution, the sale of pornography, incest and abortion. Apparently Australian courts can too easily be tempted by the wily counsel of licentious minority groups to define everything which takes place below the belt as sexual and legitimate. The Church was wrong about what activities the Commonwealth Bill could legitimise, but it was right that the Bill was vague. Unfortunately the Government-dominated Senate Committee which investigated the Church's concern confirmed that the Bill was sound. The very vagueness that had satisfied the defenders of States' rights, disappointed the TGLRG, and annoyed the Church, was splitting the Coalition between a privacy-loving majority and a homo-hating minority. Division in the Coalition was an incentive which overrode the Government's fear of the Catholic Church's influence.

One final opportunity to amend the *Human Rights (Sexual Conduct) Bill* presented itself in the Senate. With the admonitions of the Bishops still echoing in their ears, Coalition members met the Greens to discuss inserting a definition of 'arbitrary' that would satisfy the Tasmanian gay and lesbian community and the Church. No agreement could be reached and the Bill passed unamended, but not before the ALP had pulled the strings of its Sydney based gay and AIDS client groups in an effort to call the Greens to heel. Of all the Federal Government's cynical actions during the 1994 Tasmanian gay law reform debate nothing was as tragic as the ease with which it set gays and lesbians against each other in the pursuit of its own interests.

Taking Tasmania's laws to the High Court

By passing the *Human Rights (Sexual Conduct) Act 1994* Parliament abdicated to the courts its responsibility to enforce the human rights of gay and lesbian Tasmanians. According to Anne Twomey of the Parliamentary Research Service:

> In recent years criticism has been made by a number of members of Parliament that the High Court is making judgments on political questions. This Bill will actually oblige the Court to make judgments on political questions, by requiring it to determine whether or not a State law is an 'arbitrary' interference with privacy. In doing so the Court will have to consider whether the law is reasonable or proportionate to the end sought. This will be particularly difficult to determine when the ends sought are based on concepts of morality. In effect, the Parliament has abrogated its responsibility to decide such questions and left it for the High Court to determine.

In such circumstances the TGLRG has little choice but to seek a redress for the violation of our rights before the High Court. In August last year, at the same time as Michael Lavarch released the *Human Rights (Sexual Conduct) Bill*, we announced our intention to lodge a Statement of Claim with the High Court asking the Court to find that Tasmania's anti-gay laws are an arbitrary interference with the right to sexual privacy, and that therefore, to the extent of their inconsistency with the *Human Rights (Sexual Conduct) Bill* they are invalid under s.109 of the Commonwealth Constitution. The Government reacted swiftly to our implicit criticism of its Bill. It argued that a High Court challenge was unnecessary because no Tasmanian police officer would arrest a gay man when the officer's actions would most likely be found illegal by a court. The Government also claimed that our case would be unlikely to succeed because the Court does not consider matters which are hypothetical and therefore not justiciable.

On both counts the Government is wrong. Even though Tasmanian gay men are now very unlikely to be arrested for private consenting sex the police can still use these laws to justify anti-gay harassment and intimidation. Moreover, the Tasmanian Government continues to use the law to justify public policy which discriminates against gay men and lesbians. These effects are real, not hypothetical.

Anti-gay laws used to justify homophobia

Tasmanian conservatives have a long history of using our anti-gay laws to justify their homophobia. In 1988 the Hobart City Council banned a TGLRG stall from Salamanca Market, and then brought in the police to arrest those who defied the ban, because the stall was 'promoting an illegal activity'. The current Attorney-General, Ron Cornish, has consistently argued that the State cannot have sexuality anti-discrimination laws as long as homosexuality remains a criminal offence. Premier Ray Groom has long refused to allow lesbian or gay representation on the Government's Family Council on the basis that the law prohibits it.

But even after the passage of the *Human Rights (Sexual Conduct) Act* our anti-gay laws continue to provide the authorities with an easy excuse for bigotry. Earlier this year Attorney-General Cornish refused permission for the screening of several unclassified films at the inaugural Tasmanian Queer Film and Video Festival, despite the fact that these films were utterly uncontroversial, and despite the fact that at the same time he had given permission for the screening of unclassified films at the German and Dutch Film Festivals. His justification was that:

> We have laws in this State, obviously Sections 122 and 123 of the Criminal Code, which say that certain sorts of conduct are not acceptable in Tasmania. These films all relate to homosexual and lesbian lifestyles and therefore after very careful consideration it was decided we wouldn't give that exemption.

The same sentiments were reflected in recent comments by Tourism Minister Peter Hodgman, who welcomed all tourists to Tasmania, but added that homosexual tourists must obey our laws.

Finally, and perhaps most seriously, is the use of our anti-gay laws to justify homophobia in schools. A week after the UNHRC handed down its decision in April 1994 the Tasmanian Education Department Secretary, Bruce Davis, issued a memo banning any discussion of homosexuality in Tasmanian schools. Four months later, and in direct contravention of his first memo, Mr Davis issued another memo asking school principals to circulate a pamphlet from a virulently anti-gay group called Tas Alert. The pamphlet

encouraged students 'who think they may be gay' to develop fulfilling heterosexual lives under Tas Alert's supervision and counselling. Not surprisingly, homosexual and heterosexual students at Tasmania's Secondary Colleges report a marked increase in the level of anti-gay abuse and violence over the past year. When challenged over the first Davis memo in Parliament the Education Minister, John Beswick, argued that homosexuality should not be discussed because it is against the law. When challenged to explain Tas Alert's exemption from this ban he claimed that Tas Alert is an organisation that upholds the laws of the State.

A High Court invalidation of Tasmania's anti-gay laws will not eliminate homophobia, but it will force conservative regimes to find other less convenient camouflages for their hatreds. If this stops one gay or lesbian teenager from being hounded out of school or beaten up in the classroom it will be worthwhile.

Justiciable issue?

The Commonwealth was also wrong when it claimed that our case will inevitably fail because there is no justiciable issue. While the TGLRG cannot be certain that the Court will accept our case, our legal advice is that there are strong arguments for justiciability. One such argument is that the laws are inherently a discriminatory breach of the right to privacy. This argument was accepted by the UNHRC when it considered the admissibility of our communication, and we have good reason to think it will also be accepted by the High Court. Another reason that the case is justiciable is that the challenged Tasmanian laws foster and encourage discrimination by the government and in the wider community. Some examples of the wider effects of the law have been listed above and the longer the laws remain in place the more such examples will accumulate.

Are court challenges necessary to protect human rights?

A High Court invalidation of Tasmania's anti-gay laws will be an important victory for the human rights of gay and lesbian Tasmanians. But the expense and time of a High Court case could have been avoided if the Federal Government had chosen to fulfill its international obligations by directly invalidating the Tasmanian laws. The fact that it chose to leave this task in the hands of private litigants is indicative of the way the ALP is currently handling gay and lesbian human rights.

In August the ACTU asked the Federal Industrial Commission to clarify its earlier ruling that carer's leave is available to workers looking after any household member. Specifically the ACTU asked that the Commission explicitly recognise same sex couples because of the important precedent that such recognition would establish. But the Federal Government's response was that no such ruling is necessary until the Commission is faced with an individual who claims sexuality discrimination. State Branches of the ALP have quickly caught on to the fact that it is expedient to abdicate their responsibility to a Court. The Tasmanian Labor Party's policy on the recognition of same sex relationships is to enact sexuality anti-discrimination legislation, revamp the State's antiquated de facto relationships laws without explicitly recognising gay and lesbian couples, and then wait for a private citizen to convince the Supreme Court that the anti-discrimination law gives same sex partners the right to be recognised as de facto couples. If this country is to reach an accommodation with its lesbian and gay citizens through democratic debate rather than judicial decision we must begin now to protest against the ALP's politics of abdication.

The trouble of taking a case to the High Court could also have been avoided if the media and the legal establishment had been more critical of the Federal Government's response to the UNHRC decision. Progressive elements in both these institutions were carried away with the idea that the *Human Rights (Sexual Conduct) Act* entrenches a piece of international human rights law, however small, in Australian law. By adopting a part of the International Covenant on Civil and Political Rights as a standard by which we shall judge ourselves Australians were shrugging off our parochialism and impressing the world. Blinded by these pretensions our commentators and experts lost sight of the fact that the point of human rights standards is to stop human rights abuses. The *Human Rights (Sexual Conduct) Act* has not stopped the abuse that is Tasmania's anti-gay criminal laws, let alone the many abuses that arise from these laws.

Hardly any basic human rights are enshrined in Australian law and each of us has a responsibility to rectify this. But we should not let our enthusiasm for human rights standards create a situation in which the adoption of these standards is seen as an end in itself. Human rights law is a means to the end of removing injustice and improving our quality of life. If this becomes the ethos of those who are struggling against inequality in Australia we will not simply *appear* to win our battles, we will win.

Postscript

On Tuesday, 14 November 1995, Tasmanian gay activists Nick Toonen and Rodney Croome lodged a case in the High Court on behalf of the TGLRG seeking a declaration that ss.122 (a) and (c) and 123 of the Tasmanian *Criminal Code* are inconsistent with the *Human Rights (Sexual Conduct) Act 1994* (Cth) and to that extent invalid.

Senior Counsel in the case will be Alan Goldberg QC, immediate past President of the Victorian Council for Civil Liberties. Alan Goldberg has offered his services pro bono, because his clients were unable to obtain Commonwealth or State legal aid, despite fulfilling the criteria for funding as a public interest test case. It was also despite a legal opinion from Mr Goldberg which addressed concerns about standing. Toonen and Croome have both expressed concern to the press that the decisions not to fund their case have been made for political and not legal reasons.

In response to the case, the Tasmanian Attorney-General, Ron Cornish, has said that his Government stands by the challenged laws and will be vigorously defending them in the High Court. At this stage it is not known whether the Tasmanian Government will be joined in its action by any other State or Territory Government.