A History of Homosexual Law Reform in Tasmania

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In May this year, the Tasmanian Government took the significant step of enacting the *Criminal Code Amendment Act* 1997 (Tas). This had the effect of repealing sections 122 and 123 of the Tasmanian Criminal Code,[1] thereby decriminalising homosexual conduct between consenting male persons. It is a move that has seen Tasmania fall into line with the rest of the Australian States and Territories. For many of those in the gay and lesbian community, it is the culmination of years of campaigning for the repeal of laws which they believed promoted, and gave legal justification to, homophobia. For others, the repeal of these sections demonstrates a fundamental victory for human rights. Irrespective of the viewpoint, the gay law reform issue in Tasmania has proved as interesting from a legal perspective as it has from any other.

The Criminal Code Provisions

Prior to May 1997, section 122 of the Tasmanian Criminal Code stated, inter alia, as follows:

> 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.

Section 123 of the Code further provided:

> Any male person who, whether in public or private, commits any indecent assault upon, or other acts 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.

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1 The first schedule to the *Criminal Code Act* 1924 (Tas). Note that s 122 has been substituted, while s 123 has been repealed altogether.

> Charge: Indecent practice between male persons.

While section 122 was not limited to prohibiting sodomy between males, and neither section actually prohibited lesbianism, both of these provisions were seen to justify anti-homosexual behaviour and sentiment. While these provisions were still on the statute books, very little could be done about such things as workplace discrimination on the basis of sexuality, or a school curriculum that barely dealt with the issue of homosexuality.

However, the most obvious problem was in relation to HIV/AIDS and other health care concerns: while the provisions existed, the government was precluded from making an adequate response to these serious issues. As has been stated in the Australian Government's *National HIV/AIDS Strategy*:

> laws regulating and/or penalising homosexual activity and prostitution impede public health programs promoting safer sex to prevent HIV transmission, by driving underground many of the people most at risk of infection.[2]

A History of Change

Discontent with sections 122 and 123 of the Criminal Code first became apparent in the late 1970s. By this stage, similar discontent in South Australia and the Northern Territory had already led to legislative changes in those jurisdictions, and some sections of the Tasmanian community were keen to follow their example. In 1979, Tasmania's first official gay law reform group was formed. By 1982, a Tasmanian Law Reform Commission had recommended the repeal of sections 122 and 123. However, despite this evidence of dissent, it took many years before the debate gained widespread attention.

Homosexual law reform did not become an issue for the wider Tasmanian public until 1988. In this year, the Tasmanian Gay and Lesbian Rights Group (TGLRG) was formed, and began campaigning publicly for law reform, using a stall at Salamanca Market in Hobart. The Group's campaigning eventually led to several arrests at Salamanca when the Hobart City Council deemed it inappropriate for the Group to be promoting illegal activity at what was essentially a family market. What originally seemed a set-back for the TGLRG in fact created enough interest for the debate to become a significant political issue.

2 Commonwealth of Australia, *National HIV/AIDS Strategy*, AGPS, Canberra 1989.

With the increased interest in the gay law reform issue, new groups emerged that were against reform, many on the basis that any change in the law would result in a gradual breakdown of the family structure.[3] There was also concern that law reform would promote homosexuality and that this would ultimately promote the spread of HIV/AIDS. This heightened interest in homosexual law reform saw the debate eventually enter Parliament.

By 1989, the newly elected Labor Government was committed to gay law reform as a part of the Labor-Green Accord. Although the Labor Government did not see gay law reform as a priority, recognizing that the debate represented a political minefield, two new opinion polls gave credence to the pro-reform arguments, and the new *National HIV/AIDS Strategy* had already recommended the decriminalisation of homosexuality. By reducing gay law reform to a health care issue, the Labor Government was able to put an HIV/AIDS Bill before the Parliament in 1990, which included in its many provisions the proposed repeal of sections 122 and 123 of the Code. The Bill was passed in the House of Assembly,[4] but only by the narrowest of margins. It was not as successful in the Legislative Council, where those parts of the Bill that sought to decriminalise homosexuality were rejected and sent back to the Lower House for amendment. The House of Assembly refused to make the amendments, and the Bill ultimately failed.[5]

Human Rights Issue

The rejection of this Bill made it clear to those in favour of gay law reform that other avenues ought to be pursued. The push for homosexual law reform now entered the arena of international law. This was made possible by Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). Despite being a party to the ICCPR since 1980, Australia did not accede to the First Optional Protocol until 1991. This Optional Protocol allows individuals under the jurisdiction of a country which has acceded to the Protocol, to communicate with the United Nations Human Rights Committee[6] about any violations of ICCPR provisions.

3 For example, the Concerned Residents Against Moral Pollution (CRAMP), and For A Caring Tasmania (FACT).

4 Tasmania's Lower House.

5 For a more detailed analysis of this area see M Morris, *Pink Triangle* (UNSW Press, 1995).

6 Established under Article 28 of the ICCPR.

The First Optional Protocol came into force for Australia on 25 December 1991,[7] and on that day Nicholas Toonen, a member of the TGLRG, delivered the first communication under the Optional Protocol which concerned Australia.[8]

Toonen's Argument

Toonen argued that sections 122 and 123 of the Tasmanian Criminal Code violated certain provisions of the ICCPR. Specifically, Toonen claimed he was a victim of Australian violations of Articles 2(1), 17 and 26 of the ICCPR. These Articles provide:

Article 2

(1) 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.

Article 17

(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.

Article 26

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.

Toonen claimed that by prohibiting sexual acts between consenting adult males in private, the Tasmanian law breached his right to privacy, his right not to be discriminated against, and his right to equality before the law.[9]

7 H Charlesworth, 'Australia's accession to the First Optional Protocol to the International Covenant on Civil and Political Rights' (1991) 18 *Melbourne University Law Review* 428 at 428.

8 Communication No 488/1992.

9 Paragraph 3.1, Human Rights Committee Views on Communication No 488/1992.

Human Rights Committee Decision

Admissibility

Article 1 of the First Optional Protocol requires authors of complaints to be actual 'victims' of violations of the ICCPR. This presented a potential difficulty to the admissibility of the case, since at that time the sections of the Criminal Code in question had not been enforced for several years. Despite the Commonwealth Government's decision not to dispute admissibility,[10] the Committee still considered the issue.

Noting the examples given by Toonen of how sections 122 and 123 affected him,[11] the Committee concluded that:

> the threat of enforcement and the pervasive impact of the continued existence of these provisions on administrative practices and public opinion had affected him and continued to affect him personally, and that they could raise issues under Articles 17 and 26 of the Covenant. Accordingly, the Committee was satisfied that the author could be deemed a victim.[12]

Argument on the Merits

The Tasmanian Government defended its laws, arguing that on the merits, Toonen's rights had not been violated by sections 122 and 123. Specifically, it was argued that since these sections had been enacted democratically, they could not constitute an 'unlawful' interference with privacy for the purposes of Article 17. The Tasmanian Government also noted that the laws in question were not policed any differently from other laws set out in the Criminal Code, and pointed to the lack of use of the sections in the years prior to the case to support this. It was further argued that the laws were justified on public health and moral grounds.

In relation to Article 26, the Tasmanian submission conceded that sexual orientation was an 'other status' for the purposes of that provision, but denied that the Tasmanian laws discriminated between classes of citizens, instead claiming the laws simply identified those acts which were unacceptable to the Tasmanian community.[13]

The Commonwealth Government, which bears the responsibility of complying with the ICCPR, decided not to simply adopt the views of

10 See paragraph 4.1.

11 See paragraphs 2.1 to 2.7.

12 Paragraph 5.1. The decision on admissibility was dated 5 November 1992.

13 For a fuller discussion of Tasmania's arguments, and the Commonwealth response, see paragraphs 6.1 to 6.14.

the Tasmanian Government, but rather to undertake an independent assessment of Toonen's claims.[14] The Commonwealth Government conceded that Toonen had 'been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him [could not] be justified on public health or moral grounds'.[15]

The Decision on the Merits

The Human Rights Committee held unanimously that Australia had, by virtue of the Tasmanian law, violated Toonen's right to privacy under Article 17.[16] Dismissing Tasmania's claims in respect of the lack of enforcement of sections 122 and 123, the Committee held that the 'continued existence of the challenged provisions ... continuously and directly [interfered] with the author's privacy'.[17] The Committee determined that the concept of arbitrariness in Article 17 was introduced to guarantee that even an interference sanctioned by law must comply with the objectives and provisions of the Covenant.[18] It was also noted that the term 'sex' in Articles 2(1) and 26 includes sexual orientation,[19] and it was further held that the Tasmanian claims of protection of public health and community morality could not be justified.[20]

The Committee determined that since it had found that Toonen's rights under Articles 17(1) and 2(1) had been violated, it was not required to consider whether any rights under Article 26 had also been violated.[21] However, an individual opinion was given by Mr Bertil Wennergren.[22] He was of the view that Article 26 was the key provision, and the failure of the Tasmanian laws to abide by the principle of equality before the law constituted a violation of Toonen's rights under the Covenant.

14 For an interesting discussion on the position of a Commonwealth government where a violation of the ICCPR arises from the laws of a State, see Charlesworth, note 6 above, at 432-433.

15 Paragraph 6.1. See paragraphs 6.1 to 6.14 for a more complete summary of the Commonwealth's views.

16 Paragraph 8.2.

17 Ibid.

18 Paragraph 8.3.

19 Paragraph 8.7.

20 See paragraphs 8.4 to 8.7.

21 Paragraph 11.

22 See the Appendix to Human Rights Committee's Views on Communication No 488/1992.

The only effective remedy for Toonen, in the unanimous opinion of the Committee, would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.

Response to The Human Rights Committee's Decision

The views of the Human Rights Committee are not legally binding, and there are no formal means of enforcing Committee views in any case.[23] However, it has been noted that:

> although the Committee has no power to make a binding decision, its powers being essentially recommendatory in nature, it nevertheless exercises considerable influence through the publication of its views and through its reasoned conclusions.[24]

Furthermore, as a party to the ICCPR, Australia has a duty to provide an effective remedy to any person whose rights under the Covenant have been recognised as violated.[25]

A finding under Article 17—either alone or in conjunction with Article 2(1)—or under Article 26, would have given the Federal Government the authority under the external affairs power of the Constitution to intervene and overrule the offending Tasmanian provisions.[26] By finding that Toonen's rights had been violated, the Committee provided the Federal Government with the impetus to legislate on the matter.

However, the issue was not so easily resolved. For political reasons, it was deemed unwise for the Federal Government to simply step in and override the Tasmanian legislation. Instead, the Federal Government chose to introduce the *Human Rights (Sexual Conduct) Act* 1994 (Cth). This entrenched the right to sexual privacy for all Australians by prohibiting any arbitrary interference with privacy. The relevant provision, section 4, reads as follows:

> (1) Sexual conduct involving only consenting adults in private is not to be subject, by or under any law of the Commonwealth, a State or Territory, to any arbitrary interference with privacy within the meaning of

23 S Joseph, 'Gay Rights Under the ICCPR—Commentary on *Toonen v Australia*', (1994) 13 *University of Tasmania Law Review* 392 at 401. See this case note by Sarah Joseph more generally for a detailed examination of *Toonen's* case before the Human Rights Committee.

24 IA Shearer, *Starke's International Law* (11th ed, Butterworths, 1994) p 334.

25 Article 2(3)(a) of the Covenant.

26 Section 51(xxix) of the Constitution.

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.

Although it appeared as though this provision invalidated the Tasmanian legislation, by failing to define the word 'arbitrary', the Act did not detail the situations to which it would apply. The legislation left unresolved whether or not it would override the existing State provisions. The only way to satisfactorily settle the matter was to turn to the High Court.

High Court Challenge

In November 1995, a statement of claim was lodged with the High Court,[27] asking it to declare that sections 122(a) and (c) and 123 of the Tasmanian Criminal Code were, by virtue of section 109 of the Constitution, invalid due to their inconsistency with section 4 of the Commonwealth *Human Rights (Sexual Conduct) Act* 1994.

The State of Tasmania applied by summons to have the writ and statement of claim set aside. Tasmania's primary argument was that there was no 'matter'—within the meaning of that term in section 76 of the Constitution and section 30 of the *Judiciary Act* 1903 (Cth)—which could be judicially determined.

The High Court unanimously dismissed Tasmania's application, determining that 'the controversy between the plaintiffs and the defendant State as to the validity of the impugned provisions [was] a "matter" which the Court [had] jurisdiction to determine'.[28] The plaintiffs were held to have the right to know whether or not there was a continuing requirement to observe the State laws.[29] The Court found that the plaintiffs had 'a "real interest" and [did] not seek to raise a question which [was] abstract or hypothetical'.[30] Although the Director of Public Prosecutions (DPP) had not prosecuted the plaintiffs under sections 122 or 123 of the Code, they had not disabled themselves from prosecuting at sometime in the future. The High Court recognised that even if the two provisions were not enforced,

27 The plaintiffs were Nicholas Toonen and Rodney Croome, both members of the TGLRG.

28 *Croome & Another v State of Tasmania* 142 ALR 397 per Brennan CJ, Dawson and Toohey JJ at 402.

29 Id at 410-411 per Gaudron, McHugh and Gummow JJ.

30 Id at 411.

they existed as a constant threat, overshadowing the lives of gay men in Tasmania.

This decision meant that the High Court had the authority to determine whether or not sections 122 and 123 were invalidated by the Commonwealth Sexual Privacy legislation.

Legislative Activity

While there was activity in the High Court and abroad, there was further intense activity occurring in Tasmania. Since the original ALP Bill in 1990, the gay law reform issue was again taken to Parliament in 1996. As before, the Bill was passed by the Lower House, only to be rejected by the Upper House, ten votes to eight. It was becoming increasingly evident, however, that community support for gay law reform was mounting.

On 26 March 1997, the day before the Tasmanian Government lodged its High Court submission on the merits of the case against the State's anti-gay laws, another gay law reform Bill was passed in the Lower House by twenty-seven votes to six. While the opponents of reform in the Upper House suggested amendments to the Bill—including an anti-gay preamble and a higher age of consent generally—these amendments were not made. Shortly thereafter, on 10 April, Premier Tony Rundle referred to gay law reform as a symbol of the social inclusion and tolerance that is necessary in Tasmania. Two days later, an anti-gay rally in Parliament Gardens drew fifty people against law reform, and one hundred and fifty in favour. By 14 April 1997, the State Government had announced that it agreed that the State laws would be invalidated by the Commonwealth Sexual Privacy legislation.

With the case now out of the High Court, a pro-reform rally was held in Hobart on 15 April that drew 800 people in favour of gay law reform. The next day the Upper House took the historic step of voting in favour of reform by ten votes to eight.

International and Domestic Implications

When the TGLRG first began lobbying for change in 1988, no-one could have anticipated that this issue would have such far-reaching implications. Many doubted that the Human Rights Committee or the High Court would grant standing to consider the issue; but they did. This in itself is significant.

The decision of the Human Rights Committee is the first official recognition that people can be discriminated against on the basis of

sexual orientation. It is also an indication that Australia is part of an integrated international community: what occurs in Australia is not simply Australia's business, but has implications world-wide. The Australian Government's response to the decision of the Human Rights Committee, in the form of Sexual Privacy legislation, clearly reflects this. The legislation operates as an official recognition of Australia's international obligations and continuing commitment to basic human rights.

Similarly, the decision of the High Court reflects a willingness on the part of the Court to broaden its scope—to entertain issues before it that otherwise may have been deemed 'hypothetical'—when justice clearly demands it.

For Tasmania, the implications are more obvious. The position, as it stands, is that homosexuality has been decriminalised in Tasmania.