HUMAN RIGHTS COMMITTEE

Toonen v. Australia

Communication No. 488/1992

31 March 1994

CCPR/C/50/D/488/1992

VIEWS

Submitted by: Nicholas Toonen

Victim: The author

State party: Australia

Date of communication: 25 December 1991 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 March 1994,

Having concluded its consideration of communication No. 488/1992, submitted to the Human Rights Committee by Mr. Nicholas Toonen under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Nicholas Toonen, an Australian citizen born in 1964, currently residing in Hobart in the state of Tasmania, Australia. He is a leading member of the Tasmanian Gay Law Reform Group and claims to be a victim of violations by Australia of articles 2, paragraph 1; 17; and 26 of the International Covenant on Civil and Political Rights.

The facts as submitted by the author

2.1 The author is an activist for the promotion of the rights of homosexuals in Tasmania, one of Australia's six constitutive states. He challenges two provisions of the Tasmanian Criminal Code, namely, sections 122 (a) and (c) and 123, which criminalize various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private.

2.2 The author observes that the above sections of the Tasmanian Criminal Code empower Tasmanian police officers to investigate intimate aspects of his private life and to detain him, if they have reason to believe that he is involved in sexual activities which contravene the above sections. He adds that the Director of Public Prosecutions

announced, in August 1988, that proceedings pursuant to sections 122 (a) and (c) and 123 would be initiated if there was sufficient evidence of the commission of a crime.

2.3 Although in practice the Tasmanian police has not charged anyone either with "unnatural sexual intercourse" or "intercourse against nature" (section 122) nor with "indecent practice between male persons" (section 123) for several years, the author argues that because of his long-term relationship with another man, his active lobbying of Tasmanian politicians and the reports about his activities in the local media, and because of his activities as a gay rights activist and gay HIV/AIDS worker, his private life and his liberty are threatened by the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code.

2.4 Mr. Toonen further argues that the criminalization of homosexuality in private has not permitted him to expose openly his sexuality and to publicize his views on reform of the relevant laws on sexual matters, as he felt that this would have been extremely prejudicial to his employment. In this context, he contends that sections 122 (a) and (c) and 123 have created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights.

2.5 The author observes that numerous "figures of authority" in Tasmania have made either derogatory or downright insulting remarks about homosexual men and women over the past few years. These include statements made by members of the Lower House of Parliament, municipal councillors (such as "representatives of the gay community are no better than Saddam Hussein" and "the act of homosexuality is unacceptable in any society, let alone a civilized society"), of the church and of members of the general public, whose statements have been directed against the integrity and welfare of homosexual men and women in Tasmania (such as "[g]ays want to lower society to their level" and "You are 15 times more likely to be murdered by a homosexual than a heterosexual ..."). In some public meetings, it has been suggested that all Tasmanian homosexuals should be rounded up and "dumped" on an uninhabited island, or be subjected to compulsory sterilization. Remarks such as these, the author affirms, have had the effect of creating constant stress and suspicion in what ought to be routine contacts with the authorities in Tasmania.

2.6 The author further argues that Tasmania has witnessed, and continues to witness, a "campaign of official and unofficial hatred" against homosexuals and lesbians. This campaign has made it difficult for the Tasmanian Gay Law Reform Group to disseminate

information about its activities and advocate the decriminalization of homosexuality. Thus, in September 1988, for example, the Group was refused permission to put up a stand in a public square in the city of Hobart, and the author claims that he, as a leading protester against the ban, was subjected to police intimidation.

2.7 Finally, the author argues that the continued existence of sections 122 (a) and (c) and 123 of the Criminal Code of Tasmania continue to have profound and harmful impacts on many people in Tasmania, including himself, in that it fuels discrimination and violence against and harassment of the homosexual community of Tasmania.

The complaint

3.1 The author affirms that sections 122 and 123 of the Tasmanian Criminal Code violate articles 2, paragraph 1; 17; and 26 of the Covenant because:

(a) They do not distinguish between sexual activity in private and sexual activity in public and bring private activity into the public domain. In their enforcement, these provisions result in a violation of the right to privacy, since they enable the police to enter a household on the mere suspicion that two consenting adult homosexual men may be committing a criminal offence. Given the stigma attached to homosexuality in Australian society (and especially in Tasmania), the violation of the right to privacy may lead to unlawful attacks on the honour and the reputation of the individuals concerned;

(b) They distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity;

(c) The Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private. That the laws in question are not currently enforced by the judicial authorities of Tasmania should not be taken to mean that homosexual men in Tasmania enjoy effective equality under the law.

3.2 For the author, the only remedy for the rights infringed by sections 122 (a) and (c) and 123 of the Criminal Code through the criminalization of all forms of sexual activity between consenting adult homosexual men in private would be the repeal of these provisions.

3.3 The author submits that no effective remedies are available against sections 122 (a) and (c) and 123. At the legislative level, state jurisdictions have primary responsibility for the enactment and enforcement of criminal law. As the Upper and Lower Houses of the Tasmanian Parliament have been deeply divided over the decriminalization of homosexual activities and reform of the Criminal Code, this potential avenue of redress is said to be ineffective. The author further observes that effective administrative remedies are not available, as they would depend on the support of a majority of members of both Houses of Parliament, support which is lacking. Finally, the author contends that no judicial remedies for a violation of the Covenant are available, as the Covenant has not been incorporated into Australian law, and Australian courts have been unwilling to apply treaties not incorporated into domestic law.

The State party's information and observations

4.1 The State party did not challenge the admissibility of the communication on any grounds, while reserving its position on the substance of the author's claims.

4.2 The State party notes that the laws challenged by Mr. Toonen are those of the state of Tasmania and only apply within the jurisdiction of that state. Laws similar to those challenged by the author once applied in other Australian jurisdictions but have since been repealed.

The Committee's decision on admissibility

5.1 During its forty-sixth session, the Committee considered the admissibility of the communication. As to whether the author could be deemed a "victim" within the meaning of article 1 of the Optional Protocol, it noted that the legislative provisions challenged by the author had not been enforced by the judicial authorities of Tasmania for a number of years. It considered, however, that the author had made reasonable efforts to demonstrate

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 within the meaning of article 1 of the Optional Protocol, and that his claims were admissible ratione temporis.

5.2 On 5 November 1992, therefore, the Committee declared the communication admissible inasmuch as it appeared to raise issues under articles 17 and 26 of the Covenant.

The State party's observations on the merits and author's comments thereon

6.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 15 September 1993, the State party concedes that the author has been a victim of arbitrary interference with his privacy, and that the legislative provisions challenged by him cannot be justified on public health or moral grounds. It incorporates into its submission the observations of the government of Tasmania, which denies that the author has been the victim of a violation of the Covenant.

6.2 With regard to article 17, the Federal Government notes that the Tasmanian government submits that article 17 does not create a "right to privacy" but only a right to freedom from arbitrary or unlawful interference with privacy, and that as the challenged laws were enacted by democratic process, they cannot be an unlawful interference with privacy. The Federal Government, after reviewing the travaux préparatoires of article 17, subscribes to the following definition of "private": "matters which are individual, personal, or confidential, or which are kept or removed from public observation". The State party acknowledges that based on this definition, consensual sexual activity in private is encompassed by the concept of "privacy" in article 17.

6.3 As to whether sections 122 and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, the State party notes that the Tasmanian authorities advised that there is no policy to treat investigations or the prosecution of offences under the disputed provisions any differently from the investigation or prosecution of offences under the Tasmanian Criminal Code in general, and that the most recent prosecution under the challenged provisions dates back to 1984. The State party acknowledges, however, that in

the absence of any specific policy on the part of the Tasmanian authorities not to enforce the laws, the risk of the provisions being applied to Mr. Toonen remains, and that this risk is relevant to the assessment of whether the provisions "interfere" with his privacy. On balance, the State party concedes that Mr. Toonen is personally and actually affected by the Tasmanian laws.

6.4 As to whether the interference with the author's privacy was arbitrary or unlawful, the State party refers to the travaux préparatoires of article 17 and observes that the drafting history of the provision in the Commission on Human Rights appears to indicate that the term "arbitrary" was meant to cover interferences which, under Australian law, would be covered by the concept of "unreasonableness". Furthermore, the Human Rights Committee, in its general comment 16 (32) on article 17, states 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". a/ On the basis of this and the Committee's jurisprudence on the concept of "reasonableness", the State party interprets "reasonable" interferences with privacy as measures which are based on reasonable and objective criteria and which are proportional to the purpose for which they are adopted.

6.5 The State party does not accept the argument of the Tasmanian authorities that the retention of the challenged provisions is partly motivated by a concern to protect Tasmania from the spread of HIV/AIDS, and that the laws are justified on public health and moral grounds. This assessment in fact goes against the National HIV/AIDS Strategy of the Government of Australia, which emphasizes that laws criminalizing homosexual activity obstruct public health programmes promoting safer sex. The State party further disagrees with the Tasmanian authorities' contention that the laws are justified on moral grounds, noting that moral issues were not at issue when article 17 of the Covenant was drafted.

6.6 None the less, the State party cautions that the formulation of article 17 allows for some infringement of the right to privacy if there are reasonable grounds, and that domestic social mores may be relevant to the reasonableness of an interference with privacy. The State party observes that while laws penalizing homosexual activity existed in the past in other Australian states, they have since been repealed with the exception of Tasmania. Furthermore, discrimination on the basis of homosexuality or sexuality is unlawful in three of six Australian states and the two self-governing internal Australian territories. The Federal Government has declared sexual preference to be a ground of discrimination that may be invoked under ILO Convention No. 111 (Discrimination in Employment or Occupation Convention), and has created a mechanism through which

complaints about discrimination in employment on the basis of sexual preference may be considered by the Australian Human Rights and Equal Opportunity Commission.

6.7 On the basis of the above, the State party contends that there is now a general Australian acceptance that no individual should be disadvantaged on the basis of his or her sexual orientation. Given the legal and social situation in all of Australia except Tasmania, the State party acknowledges that a complete prohibition on sexual activity between men is unnecessary to sustain the moral fabric of Australian society. On balance, the State party "does not seek to claim that the challenged laws are based on reasonable and objective criteria".

6.8 Finally, the State party examines, in the context of article 17, whether the challenged laws are a proportional response to the aim sought. It does not accept the argument of the Tasmanian authorities that the extent of interference with personal privacy occasioned by sections 122 and 123 of the Tasmanian Criminal Code is a proportional response to the perceived threat to the moral standards of Tasmanian society. In this context, it notes that the very fact that the laws are not enforced against individuals engaging in private, consensual sexual activity indicates that the laws are not essential to the protection of that society's moral standards. In the light of all the above, the State party concludes that the challenged laws are not reasonable in the circumstances, and that their interference with privacy is arbitrary. It notes that the repeal of the laws has been proposed at various times in the recent past by Tasmanian governments.

6.9 In respect of the alleged violation of article 26, the State party seeks the Committee's guidance as to whether sexual orientation may be subsumed under the term "... or other status" in article 26. In this context, the Tasmanian authorities concede that sexual orientation is an "other status" for the purposes of the Covenant. The State party itself, after review of the travaux préparatoires, the Committee's general comment on articles 2 and 26 and its jurisprudence under these provisions, contends that there "appears to be a strong argument that the words of the two articles should not be read restrictively". The formulation of the provisions "without distinction of any kind, such as" and "on any ground such as" support an inclusive rather than exhaustive interpretation. While the travaux préparatoires do not provide specific guidance on this question, they also appear to support this interpretation.

6.10 The State party continues that if the Committee considers sexual orientation as "other status" for purposes of the Covenant, the following issues must be examined:

(a) Whether Tasmanian laws draw a distinction on the basis of sex or sexual orientation;

(b) Whether Mr. Toonen is a victim of discrimination;

(c) Whether there are reasonable and objective criteria for the distinction;

(d) Whether Tasmanian laws are a proportional means to achieve a legitimate aim under the Covenant.

6.11 The State party concedes that section 123 of the Tasmanian Criminal Code clearly draws a distinction on the basis of sex, as it prohibits sexual acts only between males. If the Committee were to find that sexual orientation is an "other status" within the meaning of article 26, the State party would concede that this section draws a distinction on the basis of sexual orientation. As to the author's argument that it is necessary to consider the impact of sections 122 and 123 together, the State party seeks the Committee's guidance on "whether it is appropriate to consider section 122 in isolation or whether it is necessary to consider the combined impact of sections 122 and 123 on Mr. Toonen".

6.12 As to whether the author is a victim of discrimination, the State party concedes, as referred to in paragraph 6.3 above, that the author is actually and personally affected by the challenged provisions, and accepts the general proposition that legislation does affect public opinion. However, the State party contends that it has been unable to ascertain whether all instances of anti-homosexual prejudice and discrimination referred to by the author are traceable to the effect of sections 122 and 123.

6.13 Concerning the issue of whether the differentiation in treatment in sections 122 and 123 is based on reasonable and objective criteria, the State party refers, mutatis mutandis, to its observations made in respect of article 17 (paragraphs 6.4 to 6.8 above). In a similar context, the State party takes issue with the argument of the Tasmanian authority that the challenged laws do not discriminate between classes of citizens but merely identify acts which are unacceptable to the Tasmanian community. This, according to the State party, inaccurately reflects the domestic perception of the purpose or the effect of the

challenged provisions. While they specifically target acts, their impact is to distinguish an identifiable class of individuals and to prohibit certain of their acts. Such laws thus are clearly understood by the community as being directed at male homosexuals as a group. Accordingly, if the Committee were to find the Tasmanian laws discriminatory which interfere with privacy, the State party concedes that they constitute a discriminatory interference with privacy.

6.14 Finally, the State party examines a number of issues of potential relevance in the context of article 26. As to the concept of "equality before the law" within the meaning of article 26, the State party argues that the complaint does not raise an issue of procedural inequality. As regards the issue of whether sections 122 and 123 discriminate in "equal protection of the law", the State party acknowledges that if the Committee were to find the laws to be discriminatory, they would discriminate in the right to equal protection of the law. Concerning whether the author is a victim of prohibited discrimination, the State party concedes that sections 122 and 123 do have an actual effect on the author and his complaint does not, as affirmed by the Tasmanian authorities, constitute a challenge in abstracto to domestic laws.

7.1 In his comments, the author welcomes the State party's concession that sections 122 and 123 violate article 17 of the Covenant but expresses concern that the argumentation of the Government of Australia is entirely based on the fact that he is threatened with prosecution under the aforementioned provisions and does not take into account the general adverse effect of the laws on himself. He further expresses concern, in the context of the "arbitrariness" of the interference with his privacy, that the State party has found it difficult to ascertain with certainty whether the prohibition on private homosexual activity represents the moral position of a significant portion of the Tasmanian populace. He contends that, in fact, there is significant popular and institutional support for the repeal of Tasmania's anti-gay criminal laws, and provides a detailed list of associations and groups from a broad spectrum of Australian and Tasmanian society, as well as a detailed survey of national and international concern about gay and lesbian rights in general and Tasmania's anti-gay statutes in particular.

7.2 In response to the Tasmanian authorities' argument that moral considerations must be taken into account when dealing with the right to privacy, the author notes that 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 criminal laws to entrench these different codes as little as possible; in so far as some values must be entrenched in criminal codes, these values should relate to human dignity and diversity.

7.3 As to the alleged violations of articles 2, paragraph 1, and 26, the author welcomes the State party's willingness to follow the Committee's guidance on the interpretation of these provisions but regrets that the State party has failed to give its own interpretation of these provisions. This, he submits, is inconsistent with the domestic views of the Government of Australia on these provisions, as it has made clear domestically that it interprets them to guarantee freedom from discrimination and equal protection of the law on grounds of sexual orientation. He proceeds to review recent developments in Australia on the status of sexual orientation in international human rights law and notes that before the Main Committee of the World Conference on Human Rights, Australia made a statement which "remains the strongest advocacy of ... gay rights by any Government in an international forum". The author submits that Australia's call for the proscription, at the international level, of discrimination on the grounds of sexual preference is pertinent to his case.

7.4 Mr. Toonen further notes that in 1994, Australia will raise the issue of sexual orientation discrimination in a variety of forums: "It is understood that the National Action Plan on Human Rights which will be tabled by Australia in the Commission on Human Rights early next year will include as one of its objectives the elimination of discrimination on the grounds of sexual orientation at an international level".

7.5 In the light of the above, the author urges the Committee to take account of the fact that the State party has consistently found that sexual orientation is a protected status in international human rights law and, in particular, constitutes an "other status" for purposes of articles 2, paragraph 1, and 26. The author notes that a precedent for such a finding can be found in several judgements of the European Court of Human Rights. b/

7.6 As to the discriminatory effect of sections 122 and 123 of the Tasmanian Criminal Code, the author reaffirms that the combined effect of the provisions is discriminatory because together they outlaw all forms of intimacy between men. Despite its apparent neutrality, section 122 is said to be by itself discriminatory. In spite of the gender neutrality of Tasmanian laws against "unnatural sexual intercourse", this provision, like similar and now repealed laws in different Australian states, 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 criminalizes an activity practised more often by men sexually active with other men than by men or women who are heterosexually active. The author contends that in its general comment on article 26 and in some of its views, the Human Rights Committee itself has accepted the notion of "indirect discrimination". c/

7.7 Concerning the absence of "reasonable and objective criteria" for the differentiation operated by sections 122 and 123, Mr. Toonen welcomes the State party's conclusion that the provisions are not reasonably justified on public health or moral grounds. At the same time, he questions the State party's ambivalence about the moral perceptions held among the inhabitants of Tasmania.

7.8 Finally, the author develops his initial argument related to the link between the existence of anti-gay criminal legislation and what he refers to as "wider discrimination", i.e. harassment and violence against homosexuals and anti-gay prejudice. He argues that the existence of the law has adverse social and psychological impacts on himself and on others in his situation and cites numerous recent examples of harassment of and discrimination against homosexuals and lesbians in Tasmania. d/

7.9 Mr. Toonen explains that since lodging his complaint with the Committee, he has continued to be the subject of personal vilification and harassment. This occurred in the context of the debate on gay law reform in Tasmania and his role as a leading voluntary worker in the Tasmanian community welfare sector. He adds that more importantly, since filing his complaint, he lost his employment partly as a result of his communication before the Committee.

7.10 In this context, he explains that when he submitted the communication to the Committee, he had been employed for three years as General Manager of the Tasmanian AIDS Council (Inc.). His employment was terminated on 2 July 1993 following an external review of the Council's work which had been imposed by the Tasmanian government, through the Department of Community and Health Services. When the Council expressed reluctance to dismiss the author, the Department threatened to withdraw the Council's funding unless Mr. Toonen was given immediate notice. Mr. Toonen submits that the action of the Department was motivated by its concerns over his high profile complaint to the Committee and his gay activism in general. He notes that his complaint has become a source of embarrassment to the Tasmanian government, and emphasizes that at no time had there been any question of his work performance being unsatisfactory.

7.11 The author concludes that sections 122 and 123 continue to have an adverse impact on his private and his public life by creating the conditions for discrimination, continuous harassment and personal disadvantage.

Examination of the merits

8.1 The Committee is called upon to determine whether Mr. Toonen has been the victim of an unlawful or arbitrary interference with his privacy, contrary to article 17, paragraph 1, and whether he has been discriminated against in his right to equal protection of the law, contrary to article 26.

8.2 In so far as article 17 is concerned, it is undisputed that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr. Toonen is actually and currently affected by the continued existence of the Tasmanian laws. The Committee considers that sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code "interfere" with the author's privacy, even if these provisions have not been enforced for a decade. In this context, it notes that the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future, particularly in the light of undisputed statements of the Director of Public Prosecutions of Tasmania in 1988 and those of members of the Tasmanian Parliament. The continued existence of the challenged provisions therefore continuously and directly "interferes" with the author's privacy.

8.3 The prohibition against private homosexual behaviour is provided for by law, namely, sections 122 and 123 of the Tasmanian Criminal Code. 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". a/ 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.

8.4 While the State party acknowledges that the impugned provisions constitute an arbitrary interference with Mr. Toonen's privacy, the Tasmanian authorities submit 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.

8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of AIDS/HIV. The Government of Australia observes that statutes criminalizing homosexual activity tend to impede public health programmes "by driving underground many of the people at the risk of infection". Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.

8.6 The Committee cannot accept either that for the purposes 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. It further notes that with the exception of Tasmania, all laws criminalizing 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.

8.7 The State party has sought the Committee's guidance as to whether sexual orientation may be considered an "other status" for the purposes of article 26. The same issue could arise under article 2, paragraph 1, of the Covenant. The Committee confines itself to noting, however, that in its view, the reference to "sex" in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant.

10. Under article 2, paragraph 3 (a), of the Covenant, the author, as a victim of a violation of articles 17, paragraph 1, juncto 2, paragraph 1, of the Covenant, is entitled to a remedy.

In the opinion of the Committee, an effective remedy would be the repeal of sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant requiring the 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.

12. The Committee would wish to receive, within 90 days of the date of the transmittal of its views, information from the State party on the measures taken to give effect to the views.

[Done in English, French and Spanish, the English text being the original version.]

Notes

a/ Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VI, general comment 16 (32), para. 4.

b/ Dudgeon v. the United Kingdom of Great Britain and Northern Ireland, judgment of 22 October 1981, paras. 64-70; Norris v. Ireland, judgment of 26 October 1988, paras. 39-47; Modinos v. Cyprus, judgment of 22 April 1993, paras. 20-25.

c/ The author refers to the Committee's views in case No. 208/1986 (Bhinder v. Canada), adopted on 9 November 1989, paras. 6.1 and 6.2 (see Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40 (A/45/40), annex IX.E).

d/ These examples are documented and kept in the case file.

* The text of an individual opinion submitted by Mr. Bertil Wennergren is appended.

Appendix

Individual opinion submitted by Mr. Bertil Wennergren under rule 94,

paragraph 3, of the rules of procedure of the Human Rights Committee

I do not share the Committee's view in paragraph 11 that it is unnecessary to consider whether there has also been a violation of article 26 of the Covenant, as the Committee concluded that there had been a violation of Mr. Toonen's rights under articles 17, paragraph 1, and 2, paragraph 1, of the Covenant. In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26. My reasoning is the following.

Section 122 of the Tasmanian Criminal Code outlaws sexual intercourse between men and between women. While section 123 also outlaws indecent sexual contacts between consenting men in open or in private, it does not outlaw similar contacts between consenting women. In paragraph 8.7, the Committee found that in its view, the reference to the term "sex" in article 2, paragraph 1, and in article 26 is to be taken as including sexual orientation. I concur with this view, as the common denominator for the grounds "race, colour and sex" are biological or genetic factors. This being so, the criminalization of certain behaviour operating under sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant.

Firstly, these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women. These provisions therefore set aside the principle of equality before the law. It should be emphasized that it is the criminalization as such that constitutes discrimination of which individuals may claim to be victims, and thus violates article 26, notwithstanding the fact

that the law has not been enforced over a considerable period of time. The designated behaviour none the less remains a criminal offence.

Unlike the majority of the articles in the Covenant, article 17 does not establish any true right or freedom. There is no right to freedom or liberty of privacy, comparable to the right of liberty of the person, although article 18 guarantees a right to freedom of thought, conscience and religion as well as a right to manifest one's religion or belief in private. Article 17, paragraph 1, merely mandates that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, etc. Furthermore, the provision does not, as do other articles of the Covenant, specify on what grounds a State party may interfere by way of legislation.

A State party is therefore in principle free to interfere by law with the privacy of individuals on any discretionary grounds, not just on grounds related to public safety, order, health, morals, or the fundamental rights and freedoms of others, as spelled out in other provisions of the Covenant. However, under article 5, paragraph 1, nothing in the Covenant may be interpreted as implying for a State a right to perform any act aimed at the limitation of any of the rights and freedoms recognized therein to a greater extent than is provided for in the Covenant.

The discriminatory criminal legislation at issue here is not strictly speaking "unlawful", but it is incompatible with the Covenant, as it limits the right to equality before the law. In my view, the criminalization operating under sections 122 and 123 of the Tasmanian Criminal Code interferes with privacy to an unjustifiable extent and, therefore, also constitutes a violation of article 17, paragraph 1.

A similar conclusion cannot, in my opinion, be reached on article 2, paragraph 1, of the Covenant, as article 17, paragraph 1 protects merely against arbitrary and unlawful interferences. It is not possible to find legislation unlawful merely by reference to article 2, paragraph 1, unless one were to reason in a circuitous way. What makes the interference in this case "unlawful" follows from articles 5, paragraph 1, and 26, and not from article 2, paragraph 1. I therefore conclude that the challenged provisions of the Tasmanian Criminal Code and their impact on the author's situation are in violation of article 26, in conjunction with articles 17, paragraph 1, and 5, paragraph 1, of the Covenant.

I share the Committee's opinion that an effective remedy would be the repeal of sections 122 (a) and (c) and 123, of the Tasmanian Criminal Code.