

## *Chapter 11*

# THE REPEAL OF THE SODOMY LAWS IN TASMANIA IN 1997 AND THE STATUS OF HOMOPHOBIA IN CONTEMPORARY AUSTRALIA

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A combination of factors blended to facilitate the removal of the sodomy laws in Tasmania. The founding of the United Nations in the aftermath of the atrocities committed during World War II gave rise to an International Bill of Human Rights consisting of the Universal Declaration (a General Assembly resolution reflecting the consensus of the global community) and two important international treaties – the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These provided the preliminary basis for fostering the observance of basic human rights.<sup>1</sup> Prohibiting discrimination on the basis of sexual orientation is gaining greater currency as another potential extension of the growth of the international human rights movement but has also encountered resistance in both international and domestic environments. While sodomy laws have been repealed in many nations, such as Australia, as of May 2008, such laws still exist in 86 states which are members of the United Nations.<sup>2</sup>

Australia is a signatory to the ICCPR. It is also a party to the (First) Optional Protocol to this treaty that took effect in Australia in late 1991.<sup>3</sup> States who are parties to the Protocol accept the ability of the UNHRC to entertain communications from individual persons claiming to be parties injured as a result of violations of any of the rights set forth in the ICCPR.<sup>4</sup> Under art 2 to the (First) Optional Protocol, a person alleging a breach of their rights

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and limitations of domestic law reform as exemplified in the repeal of the sodomy laws in Tasmania in 1997 in addressing homophobia. As demonstrated in this chapter, homophobia is perpetuated by a complex mix of arguably historical, political, religious and other factors (including gender, age, education and socio-economic background). Addressing homophobia requires multi-disciplinary approaches that transcend changes in the law and include the involvement of, and consultation with, all communities to foster a greater understanding and respect for the growing interaction between domestic attitudes and evolving international human rights principles of dignity, autonomy, privacy and equality in all contexts, including in the freedom to form intimate associational homosexual relationships.<sup>61</sup> Non-governmental organisations, such as Human Watch, politicians, well-known personalities (such as *Australian Idol* finalist Anthony Callea), members of the press and heroic sports figures in Australia (such as the Australian Olympic diver Matthew Mitcham who recently declared his homosexuality in a courageous way in the *Sydney Morning Herald*) can each contribute to advancing emerging international human rights norms regarding sexual orientation by embracing homosexuality in Australia as a sign of diversity and source of strength.<sup>62</sup> So too can famous figures in other marginalised and traumatised communities. Like human rights generally, GLBTIQ freedoms have come a long way. Nonetheless, they still have a long way to go. The historical experiences with, and developments since, the repeal of the sodomy laws in Tasmania over ten years ago is an example of both!

## Notes

- 1 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* 3rd edn (Oxford: Oxford University Press, 2008) pp 152, 161. As of January 2007, there were 160 state parties to the ICCPR and 155 state parties to the ICESCR; See Steiner, Alston and Goodman, pp 151, 263.
- 2 'IGLA publishes 2008 report on State-sponsored Homophobia Report-Being lesbian or gay is risking jail time in 86 countries and death penalty in 7' (Press Release, 14 May 2008) <[www.ilga.org/news\\_results.asp?LanguageID=1&FileCategory=9&ZoneID=7&FileID=1165](http://www.ilga.org/news_results.asp?LanguageID=1&FileCategory=9&ZoneID=7&FileID=1165)> (accessed 7 July 2008).

- 3 Wayne Morgan, 'Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights' *Australian Yearbook of International Law* Vol 14, (1992), p 277.
- 4 (First) Optional Protocol to the International Covenant on Civil and Political Rights, adopted and opened for signature 16 December 1966, 999 UNTS 302, art 1 (entered into force 23 March 1976).
- 5 *Ibid*, art 2. The committee will consider inadmissible anonymous communications, or ones which it considers represent an abuse of the right to submit such communications or if such communication is deemed to be unsuited to the provisions of the treaty. Also, as provided for under art 5 of the Optional Protocol, the committee will not consider any individual communications unless it has been established that: '(a) the same matter is not being considered under another procedure of international investigation or settlement; [and] (b) the individual has exhausted all available domestic remedies.' If pursuing such domestic remedies would be unduly and unreasonably delayed, the committee will not enforce art 5(2)(b).
- 6 Some commentators, such as Wayne Morgan have suggested that a gay liberation movement was spawned in Australia just prior to 1970, as manifested in the homosexual law reform subcommittees in the States of New South Wales and Victoria in addition to The Homosexual Law Reform Society of the Australian Capital Territory. Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law', *Australasian Gay & Lesbian Law Journal* Vol 5 (1995), p 28.
- 7 As with the famous *Tasmanian Dams* case (*Commonwealth v Tasmania* (1983) 158 CLR 1), the State government of Tasmania advanced State's rights arguments. Tasmania argued in both cases that the construction of the Tasmanian Dam and the sodomy laws were matters of traditional State concern. However, in the Dams case, the High Court of Australia held that the federal government could, under the External Affairs Head of Power, enact domestic legislation conforming to its obligations under international treaties on matters over which it might not otherwise have jurisdiction. The listing of certain areas in Tasmania as part of a World Heritage Park (pursuant to an International Convention to which Australia was a party) superseded Tasmania's ability to build a dam. Similarly, in the *Toonen* case, after Tasmania refused to repeal its sodomy laws even after the UNHRC ruling, the federal government simply passed a federal privacy law that had the effect of nullifying Tasmania's sodomy laws. It was only after a High Court ruling relying on the federal privacy law that Tasmania took it upon itself to repeal the antiquated sodomy statutes in 1997. See generally the writings of Rodney Croome, Gay Advocate, available at <[www.rodneycroome.id.au](http://www.rodneycroome.id.au)> (accessed 11 February 2007); See also Justice Michael Kirby, 'Three Tasmanian Law Reformers' (speech delivered at the Training Consortium, Hobart, Tasmania,

5 November 2004) <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_5nov04.html](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_5nov04.html)> (accessed 7 July 2008); Rodney Croome, 'Relationship Reform in Australia' (speech delivered at the Australian Fabian Society, Tasmanian Branch, Tasmania, 22 October 2003) <[www.fabian.org.au/919.asp](http://www.fabian.org.au/919.asp)> (accessed 7 July 2008); Sarah Joseph, 'Gay Rights Under the ICCPR – Commentary on *Toonen v Australia*' *University of Tasmania Law Review*, Vol 13 (1994) p 399; Wayne Morgan, 'Queer Law' (1995) p 22, fn 78; Wayne Morgan, 'Sexuality and Human Rights'.

- 8 His arguments were fairly detailed and developed. See 'Toonen v Australia', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994), [2.5]-[2.7], [3.1]; See also Wayne Morgan, 'Law and Change: Identifying Evil for What It Is: Tasmania Sexual Perversity and the United Nations' *Melbourne University Law Review*, Vol 19 (1994), pp 740-743 for a lengthy discussion of Toonen's arguments before the UNHRC.
- 9 'Toonen v Australia', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994), [4.1], [6.1].
- 10 Horatia Muir Watt, 'Globalization and Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), p 587.
- 11 'Toonen v Australia', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994), [5.1]
- 12 Ibid [6.1], [6.5].
- 13 Ibid, [6.2].
- 14 Ibid, [6.3].
- 15 Article 17 states: '(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.'
- 16 'Toonen v Australia', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994), [8.5].
- 17 Ibid, [8.7]. Article 2(1) of the ICCPR states: '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'.
- 18 'Toonen v Australia', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994), [9]-[11]. Article 26 states: '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.'

- 19 Joseph, 'Gay Rights Under the ICCPR – Commentary on *Toonen v Australia*', p 400.
- 20 Bertil Wennergren, 'Individual Opinion by Mr Bertil Wennergren (1994) under r 94, para 3 of the Human Rights Committee's rules of procedure, concerning the Committee's Views on Communication No 488/1992', Communication No 488/1992, *UN Doc CCPR/C/50/D/488/1992* (1994).
- 21 For example, one survey undertaken by the NSW Police in 1994 found well over half (57%) of those providing responses had been subjected to personal and property crimes or persistent harassment; well over 10 per cent of gay men (14%) and lesbians (12%) had been physically attacked. Significantly, the fear that they or their friends might be subjected to physical assault was 90 per cent; Dr Stephen Tomsen and Allen George 'Gay, Lesbian and Transgender Hate Crimes' available at Mannie de Save and Kendall Lovett, <[www.zipworld.com.au/~josken/hateintr.htm](http://www.zipworld.com.au/~josken/hateintr.htm)> (accessed 5 February 2007). See also Andrew Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', *Murdoch Electronic Journal of Law* Vol 3, No 2 (1996), para 1, who notes hate crimes committed against lesbians and gay men propagate intolerance and violence against these sexual minorities and induces fear in this class of individuals.
- 22 The NSW study also found well over half (56%) of those surveyed had been subjected to one or more types of homophobic abuse, harassment or violence in the past year. An overwhelmingly majority of respondents (85%) reported experiencing such type of homophobic conduct at some stage during the span of their lifetime. Attorney General's Department of NSW, 'You shouldn't have to hide to be safe': *A Report on Homophobic Hostilities and Violence Against Gay Men and Lesbians in New South Wales*, (2003), p 57.
- 23 *Lawrence v Texas* 539 US 558 (2003).
- 24 *Bowers v Hardwick* 478 US 186 (1986); See generally Caroline Wells Feree, 'Bowers v Hardwick: The Supreme Court Closes the Door on the Right to Privacy and Opens the Door to the Bedroom' *Denver University Law Review* Vol 64, No 3 (1988).
- 25 Joseph, 'Gay Rights Under the ICCPR', p 410; See also Holning Lau, 'Sexual Orientation: Testing the Universality of International Human Rights Law', *University of Chicago Law Review* Vol 71 (2004).
- 26 Justice Michael Kirby, 'Globalism – Future Human Rights Issues' *Reform*, Vol 76 (2000), under 'Sexuality and human rights' <[www.austlii.edu.au/au/other/alrc/publications/reform/reform76/02.html](http://www.austlii.edu.au/au/other/alrc/publications/reform/reform76/02.html)> (accessed 10 July 2008).
- 27 'Young v Australia', Communication No 941/2000, *UN Doc CCPR/C/78/D/941/2000* (2000).

- 28 *Lustig-Prean and Beckett v United Kingdom* (2001) 31 EHRR 23.
- 29 See, for example, Lau 'Sexual Orientation'. In 2003, Brazil introduced a resolution into the UNCHR entitled 'Sexual Orientation and Human Rights.' The resolution stressed that the universal enjoyment of human rights and fundamental freedoms should not be impeded on the basis of sexual orientation. It also called upon states to foster the protection of human rights for all persons regardless of sexual orientation. The resolution was to be voted on in 2005 but it was not introduced again in 2005 because there was a lack of support in the Commission: 'Sexual Orientation and Gender Identity: Human Rights Concerns for the 61st Session of the UN Commission on Human Rights' see <<http://hrw.org/english/docs/2005/03/10/global10303.htm>> (accessed 2 April 2007). Notwithstanding the withdrawal of this resolution, it is likely that GLBT activism at Geneva will continue to lobby for rights based on sexual orientation and gender identity issues: above. Ironically, some states, such as the US, have taken positions at variance with their usual embrace of universalism. They have instead focused on cultural relativist arguments in refusing to support sexual orientation rights. See Douglas Sanders, 'Human Rights and Sexual Orientation in International Law' International Lesbian and Gay Association, <[www.ilga.org/news\\_results.asp?LanguageID=1&FileCategoryID=44&FileID=577&ZoneID=7](http://www.ilga.org/news_results.asp?LanguageID=1&FileCategoryID=44&FileID=577&ZoneID=7)> (accessed 2 April 2007) under 'The Brazilian Resolution'. Given the 2003 decision in *Lawrence v Texas*, the author believes the US will ultimately adopt a universalist position in relation to sexual orientation rights, particularly if a Democrat wins the next Presidential election in 2008.
- 30 Scott Long, 'Anatomy of a Backlash: Sexuality and the 'Cultural' War on Human Rights' *Human Rights Watch* (2004), pp 3, 17. Available at <<http://hrw.org/wr2k5/anatomy/anatomy.pdf>> (accessed 7 July 2008).
- 31 See Dr Michael Food and Dr Clive Hamilton, 'Mapping Homophobia in Australia' (this volume). See also fn 7.
- 32 Heidi Gilchrist, Glennys Howarth and Gerald Sullivan, 'School's Out: Homosexuality, Bullying and Suicide, *Australian Association for Research in Education*, <[www.aare.edu.au/02pap/gil02454.htm](http://www.aare.edu.au/02pap/gil02454.htm)> (accessed 31 January 2007). A study conducted in New Zealand in 2007 found that bullying in high school tends to induce either underachievement (resulting in students choosing not to seek tertiary education) or overachievement by those who are not crushed by the experience. Gay and lesbian people tend to come out later in life if they have tertiary degrees. 'School bullying turns gay teens off education' *Massey University News*, New Zealand, <[www.massey.ac.nz/massey/about-us/news/article.cfm?mnarticle=school-bullying-turns-gay-teens-off-education-24-04-2007](http://www.massey.ac.nz/massey/about-us/news/article.cfm?mnarticle=school-bullying-turns-gay-teens-off-education-24-04-2007)> (accessed 8 July 2008).
- 33 Gilchrist, Howarth and Sullivan, 'School's Out'.
- 34 See forthcoming paper by Peter Todd, 'The Psychoneuro-immunological Data Base for Psychological Interventions in HIV

Infection', *Gay and Lesbian Issues and Psychology Review*, Vol 4, No 2 (2008). See also Peter Todd, *AIDS: A Pilgrimage to Healing—a guide for health professionals, the clergy, educators and carers* (Millennium Press, Newtown, 1992).

- 35 Sandra Berns and Alan Berman, 'Homophobia Perpetuated: The Demise of the Inquiry into the Marriage Amendment Bill 2004 (Cth)' *The Alternative Law Journal*, Vol 30, No 3 (2005), pp 104-108.
- 36 Flood and Hamilton, 'Mapping Homophobia in Australia'.
- 37 Natalie Craig, 'No room for gay developer in Penguin's property parade,' *The Age*, 9 April 2008, p 16.
- 38 Misha Schubert, 'Law reforms for gay couples' *The Age*, 30 April 2008 available at <[www.theage.com.au/articles/2008/04/29/1209234861987.html](http://www.theage.com.au/articles/2008/04/29/1209234861987.html)> (accessed 8 July 2008); See also Samantha Maiden, 'Winners and losers' in new gay laws', *The Australian*, 30 April 2008 available at <[www.theaustralian.news.com.au/story/0,25197,23621817-5013871,00.html](http://www.theaustralian.news.com.au/story/0,25197,23621817-5013871,00.html)> (accessed 8 July 2008);.
- 39 See Morgan, 'Queer Law', p 30; see also Morgan, 'Law and Change', p 745.
- 40 Some criminologists have proposed that adverse opinions towards sexual minorities are often connected to disempowered youth trying to achieve perceived socially desirable types of masculine identity. See Dr Stephen Tomsen, 'Hate Crimes and Masculinity: New Crimes, New Responses and Some Familiar Patterns' (paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses convened by the Australian Institute of Criminology, Canberra, 21-22 June 2001 <[www.aic.gov.au/conferences/outlook4/Tomsen.pdf](http://www.aic.gov.au/conferences/outlook4/Tomsen.pdf)>, (accessed 20 August 2008), p 8.
- 41 Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 14.
- 42 For example, in *R v Turner* (1994) the court applied criminal laws in a way that disadvantaged a gay man who had been murdered. The accused was found guilty of manslaughter (after successfully pleading provocation as a defence) rather than murder because the victim allegedly made a sexual advance to him which resulted in him temporarily losing self control, Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 8.
- 43 See 'Partial Defences to Murder in New South Wales 1990-2004' (*Judicial Commission of NSW*) <<http://www.judcom.nsw.gov.au/monograph28/mono28.php>> (accessed 8 July 2008).
- 44 Gail Mason, 'Violence Prevention Today No 2: Violence Against Lesbians and Gay Men' (*Australian Institute of Criminology*, November 1993) <<http://www.aic.gov.au/publications/vpt/vpt2.pdf>> (accessed 9 July 2008) at 2; quoted by Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 1-iii. Research conducted in 1989 by Roy Morgan found that over half (54%) of Australians



thought that same sex couples should not receive equal social rights and benefits as heterosexual couples. Almost half of the survey participants (47%) thought it should not be unlawful to discriminate against a person because they are homosexual: Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 13.

- 45 Long 'Anatomy of a Backlash', p 17.
- 46 See *Lawrence v Texas* 539 US 558, 568-71 (2003); See also M Foucault *The History of Sexuality Volume 1: An Introduction*, (Harmondsworth: English Pantheon Books, 1990), p 3, cited in Morgan, 'Queer Law'. The 2003-2004 Australian survey found Baptists and individuals identifying as evangelical Christians to be among the least tolerant of homosexuality. By contrast, Catholics and individuals affiliated with the Anglican and Uniting Churches as well as other religions were found to be the most tolerant of homosexuality. The authors of the survey suggest the relatively more tolerant views of Catholics in Australia can be ascribed to two factors: the 'less doctrinal authority' of the Church in relation individuals attending worship as well as the skilful ability of worshippers to intertwine their moral convictions with the many prohibitions of Church doctrine. Flood and Hamilton, 'Mapping Homophobia in Australia'.
- 47 Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 16.
- 48 Ibid, para 1-iv.
- 49 Lesbians and gay men generally hold negative images of law enforcement and are thus less reluctant to invoke the apparatus of state law enforcement in response to hate crimes, Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 3; NSW Police Department 'You Shouldn't Have to Hide To Be Safe', *Strategic Policy Framework 2007-2012*.
- 50 Fitzgerald, 'Australia's Criminal Justice System Fails Lesbians and Gay Men', para 3.
- 51 Long, 'Anatomy of a Backlash', p 2.
- 52 Ibid, p 17.
- 53 Michele Graziadei, 'Comparative Law as the Study of Transplants and Receptions' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006), pp 455-463.
- 54 As this book was being completed, Griffith University was awarded a grant from the Legal Practitioner Interest on Trust Accounts Fund (LPITAF) to investigate the prevalence of homophobic violence and the nature of such violence in Queensland as well as the extent to which non-reporting exists and the factors contributing to such non-reporting. This partially addresses this issue.
- 55 'Strategic Framework 2007-2012: Working Together: Preventing Violence against gay, lesbian, bisexual and transgender people'

<[www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/Pages/CPD\\_strategic\\_framework](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/Pages/CPD_strategic_framework)> (accessed 10 July 2008) ('*Strategic Framework 2007-2012*'); Brendan Thomas (Assistant Director General, Crime Prevention and Community Programs) (Personal correspondence 18 January 2008). See also Marion Pitts, Anthony Smith, Anne Mitchell and Sunil Patel, 'Private Lives: A report on the health and wellbeing of GLBTI Australians' (2005) <[http://webstat.latrobe.edu.au/c.latrobe?nm=http://www.latrobe.edu.au/arcshs/assets/downloads/reports/private\\_lives\\_report.pdf](http://webstat.latrobe.edu.au/c.latrobe?nm=http://www.latrobe.edu.au/arcshs/assets/downloads/reports/private_lives_report.pdf)> (accessed 8 July 2008); (Personal correspondence with Associate Professor Anne Mitchell).

- 56 Long, 'Anatomy of a Backlash', pp 3, 17.
- 57 Quotation cited by Roger Cotterrell, 'Comparative Law and Legal Culture' in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (Oxford: Oxford University Press, 2006) p 731.
- 58 Long, 'Anatomy of a Backlash', p 3.
- 59 Morgan, 'Queer Law', p 43.
- 60 Alan Berman, 'International Human Rights Law and New Zealand's Foreign Relations: A Comparative Study of New Zealand's Relations With South Africa and Iran', *University of Hawaii Law Review*, Vol 12, No 2 (1990), p 318.
- 61 Flood and Hamilton, 'Mapping Homophobia in Australia'; Long, 'Anatomy of a Backlash'.
- 62 In March 2007, *Australian Idol* finalist Anthony Callea came out in a courageous way and was congratulated for doing so by Australian High Court Justice Michael Kirby. See 'Twelve Years in the High Court – Continuity and Change' (Speech at Southern Cross University, Lismore, Australia, 30 March 2007) <[www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_30mar07.pdf](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_30mar07.pdf)> (accessed 11 July 2008) p 44. See also 'Out, proud and ready to go for gold', *Sydney Morning Herald*, 24 May 2008 <[www.smh.com.au/articles/2008/05/23/1211183107597.html](http://www.smh.com.au/articles/2008/05/23/1211183107597.html)> (accessed 8 July 2008).