

---

Volume 3 | Issue 1

---

1998

## International Human Rights Law and Sexuality: Strategies for Domestic Litigation

Kristen L. Walker  
*University of Melbourne*

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

 Part of the [Human Rights Law Commons](#)

---

### Recommended Citation

Kristen L. Walker, *International Human Rights Law and Sexuality: Strategies for Domestic Litigation*, 3 N.Y. City L. Rev. 115 (1998).  
Available at: 10.31641/clr030112

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact [cunylr@law.cuny.edu](mailto:cunylr@law.cuny.edu).

# INTERNATIONAL HUMAN RIGHTS LAW AND SEXUALITY: STRATEGIES FOR DOMESTIC LITIGATION

*Kristen L. Walker*†

## I. INTRODUCTION

Gay and lesbian sexuality has very recently been encompassed within the international human rights framework established by the Universal Declaration of Human Rights<sup>1</sup> (UDHR) and the International Covenant on Civil and Political Rights<sup>2</sup> (ICCPR). In 1994, in *Toonen v. Australia*,<sup>3</sup> the United Nations Human Rights Committee firmly established the protection of gay men and lesbians from arbitrary interference with privacy. Additionally, the Committee recognized that the ICCPR offers protection from discrimination on the basis of sexual preference. However, international human rights law is effective only when it translates into real change for people in various countries bound by the international human rights regime. In many countries, international human rights law may be used as an aid to or as the basis for domestic litigation to achieve local change. In this paper, I explore the potential use of international human rights law in domestic litigation around issues of sexuality, particularly non-normative sexualities. I will use as a case study the *Toonen* case, which concerned the battle to overturn the anti-sodomy laws in Tasmania, an Australian state.

---

† L.L.B. (Hons); B.S.c.; L.L.M. (Melb); L.L.M. (Columbia University); Senior Lecturer in Law, University of Melbourne; Adjunct Professor and J.S.D. Candidate, Columbia University Law School. I would like to thank the Fulbright Commission, without whom my doctoral work on issues of law and sexuality would not have been possible. I would also like to thank Wayne Morgan for his comments on an earlier draft of this paper and his tireless work on the *Toonen* case. A shorter version of this paper was presented at *Bringing It Home: Building International Human Rights Law, Advocacy and Culture, A Conference to Mark the 50th Anniversary of the Universal Declaration of Human Rights*, held at the City University of New York School of Law, 1 May-3 May 1998.

<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

<sup>2</sup> International Covenant on Civil and Political Rights and First Optional Protocol, G.A. Res. 2200, U.N. GAOR, 21st. Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967), *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>3</sup> Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994) [hereinafter *Toonen*]. This decision will be discussed further in Part III, below.

Although the focus of this article is Australian, I hope to offer some insights of more general relevance to the litigation of applicability of sexuality issues.

In Part II, I briefly set out some of the relevant Australian legal principles that influenced the way in which the *Toonen* case was approached at both the international and domestic levels. In Part III, I describe the unsuccessful lobbying campaign to repeal Tasmania's anti-sodomy laws and address the subsequent strategy: taking a case to the Human Rights Committee. Part IV addresses the domestic phase: lobbying for legislative change and ultimately litigating in the Australian courts. In Part V, I consider the lessons for litigating sexuality issues that can be drawn from the *Toonen* case.

## II. SOME KEY AUSTRALIAN LEGAL PRINCIPLES

### A. Australia's Constitutional Protection of Rights

Australia does not have a general, constitutional Bill of Rights. In this sense, our British heritage is clearly evident – the founders of the Constitution considered that responsible government, which requires members of the executive to be members of Parliament,<sup>4</sup> was sufficient to protect individual rights, making a full Bill of Rights unnecessary.<sup>5</sup> However, some rights are expressly protected by our Constitution: for example, a limited freedom of religion;<sup>6</sup> a freedom of interstate trade;<sup>7</sup> a right to a trial by jury for indictable offences;<sup>8</sup> a right not to be subject to discrimination on the basis of the state in which one resides;<sup>9</sup> and a limited right to vote.<sup>10</sup>

In addition to the few rights that are expressly provided for in the Australian Constitution, the High Court of Australia has found an implied restriction on the Commonwealth Parliament's power

---

<sup>4</sup> See AUSTL. CONST. ch. II, § 64.

<sup>5</sup> See OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION, 1897-1898, Melbourne, 664-91; see also Peter H. Bailey, HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT 50-51 (1990); J.A. La Nauze, THE MAKING OF THE AUSTRALIAN CONSTITUTION 227-32 (1972).

<sup>6</sup> AUSTL. CONST. ch. V, § 116 (this section has been restrictively interpreted); see Attorney-General for the State of Victoria *ex rel.* Black v. Commonwealth (1981) 146 C.L.R. 559; Church of Scientology, Inc. v. Woodward (1982) 154 C.L.R. 25.

<sup>7</sup> AUSTL. CONST. ch. IV, § 92; see *Cole v. Whitfield* (1988) 165 C.L.R. 360.

<sup>8</sup> AUSTL. CONST. ch. III, § 80; see *Cheatle v. The Queen* (1993) 177 C.L.R. 541.

<sup>9</sup> AUSTL. CONST. ch. V, § 117; see *Street v. Queensland Bar Association* (1989) 168 C.L.R. 461.

<sup>10</sup> AUSTL. CONST. ch. I, pt. II, § 7; pt. III, § 24. But see *McGinty v. Western Australia* (1996) 134 A.L.R. 289; *Langer v. Commonwealth* (1996) 134 A.L.R. 400.

to limit political communication.<sup>11</sup> This restriction is loosely known as the implied right to freedom of political speech, which has been extended to limit the power of the State Parliaments and to modify the common law.<sup>12</sup> Notably, this right is confined to citizens; it does not protect the political communication of non-citizens.<sup>13</sup>

Australia's federal structure places limitations on the Commonwealth Parliament's law-making powers.<sup>14</sup> The Parliament has no specific power to protect rights generally. However, the Parliament has used a combination of powers, such as the corporation's power<sup>15</sup> and, more importantly, the external affairs power to protect rights.<sup>16</sup> If the Commonwealth Parliament enacts human rights legislation, or any other kind of legislation, then that legislation overrides any inconsistent State legislation by virtue of Section 109 of the Constitution, which makes federal laws paramount.<sup>17</sup>

The combination of the absence of rights protection and the Commonwealth Parliament's limited legislative competence has led to a significant role for international law in the protection of human rights in Australia.

### *B. The Relationship Between International Law and Australian Law*

Australia is a party to the main human rights treaties, including the ICCPR.<sup>18</sup> However, this does not necessarily ensure legal protection for individuals within Australia. The basic rule governing the relationship between international treaties and domestic law in Australia is that international conventions are not part of domestic law—that is, they are not enforceable in domestic courts.

---

<sup>11</sup> See *Australian Capital Television Pty. Ltd. v. Commonwealth* (1992) 177 C.L.R. 106; *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1.

<sup>12</sup> See *Theophanous v. Herald and Weekly Times Ltd.* (1994) 182 C.L.R. 104; *Stephens v. West Australian Newspapers Ltd.* (1994) 182 C.L.R. 211.

<sup>13</sup> See *Cunliffe v. Commonwealth* (1994) 182 C.L.R. 272.

<sup>14</sup> See *AUSTL. CONST.* ch. I, pt. V, §§ 51- 52 (enumerating the powers of the federal Parliament).

<sup>15</sup> See *id.* ch. I, pt. V, § 51 (xx).

<sup>16</sup> See *id.* ch. I, pt. V, § 51 (xxix); see *infra* Part III.

<sup>17</sup> See *id.* ch. V, § 109.

<sup>18</sup> Other treaties to which Australia is a party include the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 19, 1966, *entered into force* Jan. 3, 1976, 993 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination, *adopted* Dec. 21, 1965, *entered into force* Jan. 4, 1969, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, *entered into force* Sept. 3, 1981, 1249 U.N.T.S. 13; Convention on the Rights of the Child, *adopted* Nov. 20, 1989, *entered into force*, Sept. 20, 1990.

This premise has been established in a series of cases.<sup>19</sup>

However, the Commonwealth Parliament is able to legislate to give effect to treaties using the external affairs power.<sup>20</sup> This was recently reaffirmed by the High Court in *Victoria v. Commonwealth*,<sup>21</sup> where the Court stated:

To be a law with respect to "external affairs" the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty; it is for the Executive to choose the means by which it carries into or gives effect to a treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end.

...

The [external affairs] power was designed to authorise the implementation of treaty obligations which bound Australia.<sup>22</sup>

This interpretation of the external affairs power has been controversial in Australian legal and political arenas due to its effect on the federal balance between the States and the Commonwealth,<sup>23</sup> but it is well established. Indeed, an argument was presented to the Court in *Victoria v. Commonwealth* that the power ought to be confined so as to reduce the potential for the Commonwealth to trespass upon areas previously within the sole province of the States.<sup>24</sup> However, that argument was rejected:

According to basic constitutional principle, and with qualifications not presently relevant, the intrusion of Commonwealth law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Commonwealth law provided it

---

<sup>19</sup> See *Brown v. Lizars* (1905) 2 C.L.R. 837, 851; *Chow Hung Ching v. The King* (1948) 77 C.L.R. 449, 478; *Bradley v. Commonwealth* (1973) 128 C.L.R. 557, 582; *Tasmanian Wilderness Society, Inc. v. Fraser* (1982) 153 C.L.R. 270; *Kioa v. West* (1985) 159 C.L.R. 550, 570; *Mabo v. Queensland* [No. 2] (1992) 175 C.L.R. 1, 55, 79; *Dietrich v. The Queen* (1992) 177 C.L.R. 292, 305, 359-60; *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 128 A.L.R. 353, 362, 370, 384.

<sup>20</sup> See *Tasmania v. Commonwealth (The Tasmanian Dam Case)* (1985) 158 C.L.R. 1; *Kirmani v. Captain Cook Cruises Proprietary Ltd.* (1985) 159 C.L.R. 351; *Gerhardy v. Brown* (1985) 159 C.L.R. 70; *Richardson v. Forestry Comm'n* (1988) 164 C.L.R. 261; *Queensland v. Commonwealth (The Queensland Rainforest Case)* (1989) 167 C.L.R. 232. For a more comprehensive analysis of the external affairs power and the role of treaties, see Leslie Zines, *THE HIGH COURT AND THE CONSTITUTION*, Ch. 13 (3d ed. 1992); Donald R. Rothwell, *The High Court and the External Affairs Power: A Consideration of its Outer and Inner Limits*, 15 ADEL. L. REV. 209 (1993); Brian R. Opeskin and Donald R. Rothwell, *The Impact of Treaties on Australian Federalism*, 27 CASE W. RES. J. INT'L L. 1 (1995).

<sup>21</sup> (1996) 138 A.L.R. 129.

<sup>22</sup> *Id.* at 130, 144.

<sup>23</sup> See Sir Garfield Barwick, *The External Affairs Power of the Commonwealth and the Protection of World Heritage*, 25 U. WEST. AUSTRAL. L. REV. 233 (1995).

<sup>24</sup> *Victoria v. Commonwealth*, 138 A.L.R. at 144.

is, in truth, a law with respect to external affairs.<sup>25</sup>

C. *The Use of the External Affairs Power for the Protection of Human Rights*

The Commonwealth's ability to use the external affairs power to implement treaties has been significant in the federal protection of human rights in Australia. Many important pieces of legislation have been enacted in reliance upon the existence of a human rights treaty where the Commonwealth would not otherwise have the constitutional power to enact such legislation. Some notable examples include the Racial Discrimination Act of 1975 (Cth.)<sup>26</sup> (relying on the Convention on the Elimination of all Forms of Racial Discrimination), the Sex Discrimination Act of 1984 (Cth.)<sup>27</sup> (relying on the Convention on the Elimination of Discrimination Against Women), the Human Rights and Equal Opportunity Commission Act of 1986 (Cth.)<sup>28</sup> (relying on a series of Conventions, including the ICCPR) and the Disability Discrimination Act of 1992 (Cth.)<sup>29</sup> However, the law can do only part of the work to effect social change: limitations on the effectiveness of these legislative regimes still exist. For example, decisions of the Human Rights and Equal Opportunity Commission under the Racial Discrimination Act and the Sex Discrimination Act have been held to be unenforceable because of the separation of powers principle enshrined in the Constitution.<sup>30</sup> This not only reduces the effectiveness of the main human rights watchdog in Australia, it also reduces access to remedies for human rights violations by requiring individuals to use the courts, which often involves significant costs and lengthy delays.

Recently, the Sexuality Discrimination Bill of 1995 (Cth.)<sup>31</sup> was introduced into the Parliament, again in reliance on the external affairs power and the ICCPR.<sup>32</sup> This Bill has not yet been passed

---

<sup>25</sup> *Id.* at 145.

<sup>26</sup> See Racial Discrimination Act 1975 (Austl.).

<sup>27</sup> See Sex Discrimination Act 1984 (Austl.).

<sup>28</sup> See Human Rights and Equal Opportunity Comm'n Act 1986 (Austl.).

<sup>29</sup> See Disability Discrimination Act 1992 (Austl.).

<sup>30</sup> The Human Rights and Equal Opportunity Commission is not a court; as such it is not permitted to exercise judicial power, including the power to give binding decisions under the Racial Discrimination Act and Sex Discrimination Act. See *Brandy v. Human Rights & Equal Opportunity Comm'n* (1995) 127 A.L.R. 1, 2.

<sup>31</sup> See Sexuality Discrimination Bill 1995 (Austl.).

<sup>32</sup> The Bill was introduced in the Senate by the Democrats, a minor party. While the Senate passed the Bill in May 1998, it is unlikely that it will pass through the House of Representatives, which is presently dominated by the Liberal and National

into law and it is not likely to be because of the conservative dominance of the Lower House.

### III. CASE STUDY: CRIMINALIZATION OF GAY MALE SEX IN TASMANIA

#### A. *Background*

Most states in Australia decriminalized gay male sex (lesbian sex was never expressly criminalized in Australia) in the 1970s, 1980s and early 1990s.<sup>33</sup> However, Tasmania steadfastly refused to do so. The Tasmanian Criminal Code relevantly provided:

§ 122: - Any person who -

(a) has sexual intercourse with any person against the order of nature;

. . . or . . . .

(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.

§ 123:

Any male person who, whether in public or private, commits any indecent assault upon, or other act of gross indecency with, another male person, or procures another male person to commit any act of gross indecency with himself or any other male person, is guilty of a crime.

Charge: Indecent practice between male persons.<sup>34</sup>

In the 1980s and early 1990s, Tasmania witnessed a period of sustained activism by gay men and lesbians to have the legislation repealed. However, extensive lobbying and protests were futile. Although the government supported legislative reform on two occasions, the gerrymandered upper house continually blocked such efforts. No court case was possible, however, because no constitutional provision existed (such as a right to privacy or equality) that could be used as a basis to challenge a properly enacted law. Furthermore, there was no relevant federal legislation which could be used to override the Tasmanian legislation.<sup>35</sup> The only route was

---

Parties, parties known for their opposition to pro-gay law reform. For a more detailed discussion of the Sexuality Discrimination Bill, see Wayne Morgan, *A Queer Kind of Law: The Senate Inquires into Sexuality*, 2 INT'L J. DISCRIMINATION & LAW 317 (1997).

<sup>33</sup> See Tasmanian Gay and Lesbian Rights Group, *It's Over: Nine Year Gay Law Reform Campaign Ends in Victory*, <<http://www.tased.edu.au/tasonline/tasqueer/flash.html>> (May 1, 1997).

<sup>34</sup> TAS. CRIM. CODE §§ 122-123.

<sup>35</sup> Australia has no federal anti-discrimination law covering discrimination on the basis of sexual orientation; nor does Australia have a comprehensive regime protecting the right to privacy. There is some protection of privacy, but it is limited to the area of data collection. See Privacy Act of 1988 (Cth.) (Austl.).

legislative change, but this proved impossible to achieve.

*B. The Toonen Case at the United Nations Human Rights Committee*

The opportunity for new a strategy came in December 1991, when Australia ratified the First Optional Protocol to the ICCPR,<sup>36</sup> which permitted individuals to make complaints to the United Nations Human Rights Committee regarding human rights breaches by Australia. Nicholas Toonen, a gay man living in Tasmania, lodged the first communication from Australia the day the ratification of the First Optional Protocol took effect.<sup>37</sup> Mr. Toonen was supported by the Tasmanian Gay and Lesbian Rights Group (TGLRG).<sup>38</sup> The complaint alleged breaches of the ICCPR with respect to the rights to privacy and equality.<sup>39</sup>

#### THE ADMISSIBILITY PHASE

The first stage of the *Toonen* case before the United Nations Human Rights Committee concerned admissibility. The issues involved standing and exhaustion of local remedies, which requires individuals to explore all avenues in their domestic legal system before making a complaint to the Committee. The United Nations Human Rights Committee is required to satisfy itself of a complainant's standing before proceeding with the case.<sup>40</sup> Standing was in issue because Mr. Toonen had not been arrested, charged, or prosecuted under the laws in question. Indeed, for almost ten years there had been no prosecution under the Tasmanian legislation of consensual gay male sex in private.<sup>41</sup> Mr. Toonen and the TGLRG argued that the laws resulted in discrimination, stigmatization and violence against gay men and lesbians and gave extensive examples from Mr. Toonen's own life.<sup>42</sup> The Human Rights Committee accepted Mr. Toonen's arguments on the standing issue.

---

<sup>36</sup> See Wayne Morgan, *Sexuality and International 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*, 14 AUSTL. Y.B. INT'L L. 277 (1993).

<sup>37</sup> See Toonen, *supra* note 3, ¶ 1.

<sup>38</sup> See Toonen, *supra* note 3, ¶ 1.

<sup>39</sup> See Toonen, *supra* note 3, ¶¶ 2.3, 2.4.

<sup>40</sup> See Toonen, *supra* note 3, ¶¶ 8.1, 8.3. The committee found that Mr. Toonen had made reasonable efforts to demonstrate that the threat of enforcement had affected and continued to affect him.

<sup>41</sup> Sections 122 and 123 of the Tasmanian Criminal Code have been used to prosecute "public" consensual sexual activity between men and sexual activity with minors, but this was not relevant to the case. The state party conceded that the laws in question have not been prosecuted since 1984. Toonen, *supra* note 3, ¶ 8.2.

<sup>42</sup> See Toonen, *supra* note 3, ¶ 2.5.



## THE MERITS PHASE

Mr. Toonen's complaint alleged a breach of two provisions of the ICCPR: Article 17, which protects privacy, and Article 26, which provides for equality.<sup>43</sup> Privacy was the main argument on which the Committee focused, though equality was also briefly addressed. Article 17 of the ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence. . .
2. Everyone has the right to the protection of the law against such interference or attacks.<sup>44</sup>

Mr. Toonen claimed that the mere existence of the laws criminalizing gay male sex amounted to an arbitrary interference with his privacy, notwithstanding that they had not been used against private, consensual sexual activity for some time.<sup>45</sup> Tasmania, on the other hand, argued that even if they interfered with Toonen's privacy, the laws were not arbitrary, as they promoted public health and morality.<sup>46</sup>

Notably, the respondent in the case was Australia, not the state of Tasmania. Although Tasmania disputed Toonen's claim, Australia, at the federal level, did not, and filed submissions conceding the privacy argument.<sup>47</sup> However, in an unusual step, Tasmania's arguments were also submitted to the Committee by the Australian government in deference to basic requirements of fairness, which require that both sides be permitted to put their case forward.<sup>48</sup>

On the issue of equality, two arguments were made: one based on sex and the other on sexual preference.<sup>49</sup> Article 26 of the ICCPR provides:

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,

---

<sup>43</sup> See Toonen, *supra* note 3, ¶ 1.

<sup>44</sup> See ICCPR, *supra* note 2, at 177.

<sup>45</sup> See Nicholas Toonen, *Merits Response*, Dec. 25, 1993, <[http://www.queer.org.au/qrd/documents/legal/taslaw/merits\\_response.html](http://www.queer.org.au/qrd/documents/legal/taslaw/merits_response.html)>.

<sup>46</sup> See TGLRG, *The U.N. Case*, [hereinafter *The U.N. Case*] <[http://www.tased.edu.au/tasonline/tasqueer/un\\_case/un\\_case2.html](http://www.tased.edu.au/tasonline/tasqueer/un_case/un_case2.html)>.

<sup>47</sup> See *Merits Response*, *supra* note 45.

<sup>48</sup> Notwithstanding this apparent emphasis on fairness, both the Tasmanian and Australian governments initially refused to allow the TGLRG access to Tasmania's arguments, until required to do so under Australian Freedom of Information laws, see *The U.N. Case*, *supra* note 46.

<sup>49</sup> See Toonen, *supra* note 3, ¶ 8.7.

political or other opinion, national or social origin, property, birth or other status.<sup>50</sup>

The argument based on sex was straightforward: because Section 123 of the Tasmanian Criminal Code was confined in its operation to men, it *prima facie* discriminated on the basis of sex,<sup>51</sup> and this was conceded by the Australian government.<sup>52</sup> The argument based on sexual preference was not as straightforward, because sexual preference is not mentioned in Article 26 as a prohibited basis of discrimination. Mr. Toonen and the TGLRG argued that sexual preference was included in the term "other status" and thus was covered by the ICCPR's protection of the right to equality.<sup>53</sup> On this issue, rather than conceding the argument, the Australian government sought the Committee's guidance.<sup>54</sup>

The Human Rights Committee upheld Mr. Toonen's complaint.<sup>55</sup> The Committee took the view that the mere presence of the criminal law, even in the absence of recent prosecutions under it, amounted to a violation of the right to privacy. It stated:

The Committee considers that [S]ections 122(a) and (c) and [Section] 123 of the Tasmanian Criminal Code "interfere" with [Mr. Toonen's right to] privacy, even if these provisions have not been enforced for a decade.<sup>56</sup>

The Committee rejected Tasmania's argument that the interference with privacy was justified on public health grounds and the protection of morals, noting that, in fact, "criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention."<sup>57</sup> The Committee also noted that morality is

---

<sup>50</sup> See ICCPR, *supra* note 2, at 179. In addition to Article 26, Article 2(1) also provides for non-discrimination in the application of the various rights set out in the ICCPR:

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 recognized 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.

See ICCPR, *supra* note 2, at 173. Mr. Toonen relied on Article 2(1) in conjunction with Article 17 as part of his case.

<sup>51</sup> Of course, one remedy for this breach would simply be to extend the law's operation to women—certainly not the outcome the TGLRG was seeking.

<sup>52</sup> See *The U.N. Case*, *supra* note 46.

<sup>53</sup> See Merits Response, *supra* note 45.

<sup>54</sup> See Merits Response, *supra* note 45, at 3(a)(ii).

<sup>55</sup> See Toonen, *supra* note 3, ¶ 8.6.

<sup>56</sup> See Toonen, *supra* note 3, ¶ 8.2.

<sup>57</sup> See Toonen, *supra* note 3, ¶ 8.5.

not a matter of exclusively domestic concern.<sup>58</sup>

The Committee did not find it necessary to form a view on the equality question, but in passing it commented that when the ICCPR prohibits discrimination on the basis of 'sex' in Article 26 and Article 2(1), it includes 'sexual orientation.'<sup>59</sup> This indicates that all rights protected by the ICCPR ought to be extended to individuals regardless of their sexual preference.

#### IV. THE AFTERMATH OF THE *TOONEN* CASE: TRANSLATION INTO DOMESTIC LAW

The Human Rights Committee recommended that the appropriate remedy for Australia's breach of the ICCPR was the repeal of the offending laws.<sup>60</sup> However, Tasmania refused to act.<sup>61</sup> Because of the relationship between Australian law and international law in the Australian legal system, the ICCPR, as interpreted by the Committee, had no direct effect in Australian law. Hence, Mr. Toonen and the TGLRG still could not go to court to have Tasmania's laws declared invalid.

The focus of reform thus shifted to the federal government. After significant lobbying, the Commonwealth Parliament enacted the Human Rights (Sexual Conduct) Act of 1994 (Cth.).<sup>62</sup> This Act was couched in the narrowest possible terms, providing only that sexual conduct between consenting adults in private was not to be subject to any arbitrary interference with privacy within the meaning of Article 17 of the ICCPR.<sup>63</sup> There was no attempt to give effect to the Committee's view that the ICCPR's equality right extended to sexual preference.<sup>64</sup>

The Human Rights (Sexual Conduct) Act was a direct incorporation of part of the ICCPR's right to privacy into Australian law, making it enforceable in domestic courts. It was enacted solely in reliance on the external affairs power: as an implementation of

---

<sup>58</sup> See Toonen, *supra* note 3, ¶ 8.6.

<sup>59</sup> See Toonen, *supra* note 3, ¶ 8.7.

<sup>60</sup> See Toonen, *supra* note 3.

<sup>61</sup> See Rodney Croome, *Sexual (mis)conduct*, 20 ALTERNATIVE LAW J. 282 (1995) (discussing effects of anti-gay Tasmanian laws); Wayne Morgan, *Protecting Rights or Just Passing the Buck? The Human Rights (Sexual Conduct) 1994*, 1 AUSTL. J. OF HUM. RTS. Bill 409, 410 (1994); Bruce Montgomery, *State Rejects Gay Law Change*, THE AUSTRALIAN, Sept. 28, 1994, at 4.

<sup>62</sup> See Human Rights (Sexual Conduct) Act 1994 (Austl.).

<sup>63</sup> See Human Rights (Sexual Conduct) Act, § 4(1).

<sup>64</sup> The Parliament could have enacted sexuality anti-discrimination laws at a federal level, but the government lacked the political will to undertake such a step.

Australia's international treaty obligations.<sup>65</sup> Not only was it controversial in nature due to its subject matter, but also because of the States' rights arguments mentioned earlier, and because of the role played by the Human Rights Committee. A number of commentators suggested that it was entirely inappropriate for a Committee composed of foreigners,<sup>66</sup> described as "unrepresentative, unelected and motley" and coming from countries with poor human rights records, to be pronouncing on Australia's human rights record and, worse, to be dictating the content of our laws.<sup>67</sup>

The intended effect of the Human Rights (Sexual Conduct) Act was to override the provisions of the Tasmanian Criminal Code through the inconsistency of the protection of privacy in the Federal Act with the criminalization of gay sex in the state Act.<sup>68</sup> However, due to political maneuvering, the legislation was not drafted sufficiently clearly to achieve its intended aim, without further interpretation by a court.<sup>69</sup> Tasmania claimed that its criminal laws did not arbitrarily interfere with privacy rights and therefore remained valid, even in the face of the Committee's decision.<sup>70</sup> Thus there was some degree of uncertainty as to the precise status of the Tasmanian laws, notwithstanding the Human Rights Committee's views and federal legislation. Mr. Toonen and another prominent Tasmanian gay activist, Rodney Croome, then lodged a claim with the High Court seeking a declaration that the Tasmanian legislation was invalid because it was inconsistent with the federal Human Rights (Sexual Conduct) Act.<sup>71</sup>

The Croome case has now been terminated due to legislative change in Tasmania. However, in 1996, the first stage of the case concerning the Court's jurisdiction was heard.<sup>72</sup> Tasmania initially objected to the plaintiffs' standing on the basis that they had not been prosecuted under the challenged laws.<sup>73</sup> It later withdrew

<sup>65</sup> See Croome, *supra* note 61, at 282.

<sup>66</sup> Although there was in fact an Australian member of the Committee, Justice Elizabeth Evatt.

<sup>67</sup> Guy Barnett, *U.N.: A Law to Itself on Tasmanian Gay Rights*, THE AUSTRALIAN, Oct. 26, 1994, at 3; see Editorial, *U.N. Rules from Afar*, THE HERALD SUN, Apr. 13, 1994, at 9; Rod Kemp, *Shoot the Umpire*, THE HERALD SUN, Apr. 13, 1994 at 10; Geoffrey Barker, *A Wrong Move for the Right Reasons*, THE AGE, Apr. 21, 1994, at 6.

<sup>68</sup> See Croome, *supra* note 61, at 282.

<sup>69</sup> See Croome, *supra* note 61, at 282.

<sup>70</sup> See Croome, *supra* note 61, at 283.

<sup>71</sup> The author acted as legal adviser to the plaintiffs and the Tasmanian Gay and Lesbian Rights Group in the High Court case.

<sup>72</sup> See *Croome v. Tasmania* (1997) 142 A.L.R. 397.

<sup>73</sup> See *id.* Before the case began and independently of it, the plaintiffs had made confessions of sodomy to the police and a lesbian activist had confessed to aiding and

that objection,<sup>74</sup> but argued that the issue was hypothetical, for the same reason, and therefore beyond the jurisdiction of the Court because federal courts do not have the power to give advisory opinions.<sup>75</sup> The plaintiffs made essentially the same arguments that they had made to the Human Rights Committee: that prosecutions were irrelevant as the Tasmanian Criminal Code impacted on their daily lives regardless of prosecution under its provisions.<sup>76</sup> In particular, they argued that the Code was used to justify discrimination both by individuals and by the government.<sup>77</sup> In those circumstances, it was argued, prosecution was unnecessary either to establish standing or to establish the court's jurisdiction; the interest the plaintiffs had was sufficient and the matter was not hypothetical.<sup>78</sup> Furthermore, the plaintiffs asserted that Section 109 of the Constitution, concerning the preemption of federal laws, operates to confer upon individuals a right to know the law that governs their behavior.<sup>79</sup>

The High Court handed down its decision on the preliminary questions of standing and jurisdiction in February 1997.<sup>80</sup> It decided unanimously that the plaintiffs had a sufficient interest to attract standing and that the case did not concern a hypothetical question.<sup>81</sup> Rather, it concerned a dispute about the rights and duties of the plaintiffs and involved the administration of the law—namely, the administration of the Human Rights (Sexual Conduct)

---

abetting such acts by knowingly lending her apartment to one of the plaintiffs for the purpose of sexual activity. However, no charges were laid, although the Director of Public Prosecutions concluded that there was a case to answer. The Tasmanian government relied upon this as demonstrating the absence of a threat of prosecution. *See id.*

<sup>74</sup> Tasmania gave no reasons for the withdrawal of this argument, which proved fatal to their objections to the court's jurisdiction. One can only speculate as to whether the Tasmanian government wanted to lose the case for political reasons, or whether they were simply unable to see the consequences of their move.

<sup>75</sup> *Croome*, 142 A.L.R. at 405; *see also In re The Judiciary Act 1903-1920 and The Navigation Act 1912-1920* (1921) 29 C.L.R. 257 (discussing the federal courts' inability to give advisory opinions); *North Galanja Aboriginal Corp. v. Queensland* (1996) 185 C.L.R. 595 (holding that to allow an advisory opinion would be to go beyond the constitutional empowerment of the High Court in its appellate and original jurisdiction).

<sup>76</sup> *Croome*, 142 A.L.R. at 403.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 411.

<sup>79</sup> *Id.* at 410; *see also University of Wollongong v. Metwally* (1984) 158 C.L.R. 447, 457, 476-77 (discussing the argument that Section 109 centers rights on individuals to know the law applicable to their conduct).

<sup>80</sup> *Croome*, 142 A.L.R. at 404.

<sup>81</sup> *Id.*

Act, in conjunction with the Constitution.<sup>82</sup> Three judges also accepted the plaintiffs' argument that Section 109 of the Constitution confers on individual Australians a right to ascertain which law governs their conduct where a State law and a federal law conflict.<sup>83</sup> This aspect of the case, if subsequently accepted by a majority of the Court, will have significant implications for the ability of individuals to enforce rights granted under federal legislation implementing Australia's international obligations.

Under the present state of Australian constitutional law, it was clear that Tasmania could not succeed on the merits of the case having lost the standing and jurisdiction arguments. In April 1997, the Tasmanian Parliament passed legislation repealing the offending sections of the Criminal Code, which removed the need for a hearing on the merits.<sup>84</sup>

#### V. IMPLICATIONS FOR DOMESTIC LITIGATION STRATEGIES

The *Toonen* case study is illustrative of a number of points about using international human rights law to assist in domestic

---

<sup>82</sup> *Id.* at 399.

<sup>83</sup> *Id.* at 410.

<sup>84</sup> The merits phase would have addressed whether the Human Rights (Sexual Conduct) Act overrode Sections 122 and 123 of the Tasmanian Criminal Code. This would have involved arguments about the meaning of "arbitrary interference" in the Commonwealth legislation; the use to which international law may be put in determining Parliament's intention; and most importantly, the use to which the views of the Human Rights Committee and the European Court of Human Rights may be put in determining the outcome of the case. It was expected that, following its earlier jurisprudence on the subject, the Court would have interpreted the Act in accordance with international standards. As Justice Brennan observed in *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 265:

When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty. A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law. Indeed, to attribute a different meaning to the statute from the meaning which international law attributes to the treaty might be to invalidate the statute in part or in whole, and such a construction of the statute should be avoided. (citations omitted).

Thus it was likely that the Court would have adopted the interpretation of Article 17 of the ICCPR enunciated by the Human Rights Committee, drawing perhaps on European jurisprudence for assistance. On such an approach, there was little doubt that the mere existence of the Tasmanian Criminal Code amounted to an arbitrary interference with privacy within the meaning of the Human Rights (Sexual Conduct) Act and would have been found to be inconsistent with that Act and invalid to the extent of the inconsistency.

battles. First, it illustrates the importance of international human rights law in offering an avenue for individuals to seek redress for human rights violations and to achieve change in Australian and other legal systems where domestic law is discriminatory or oppressive. Had it not been for the international avenue under the First Optional Protocol to the ICCPR, it is most unlikely that the federal government would ever have legislated on the issue, and change would not have occurred. Unfortunately, of course, victory at the international level will not always translate into change in the domestic legal system. Australia has also been found to be in breach of the ICCPR in its treatment of refugees upon their arrival in Australia,<sup>85</sup> yet this decision has not resulted in any change to the oppressive legislative regime under which mistreatment is justified. Indeed, the government has positively ruled out such change.<sup>86</sup> Furthermore, when domestic legal change occurs, it will not necessarily result in real changes in people's lives; law may be a powerful discourse, but it cannot alter prejudice and discrimination overnight.

Second, the *Toonen* case illustrates that the process of using international law can be very long and drawn out in terms of achieving substantive change. Toonen's original communication with the Committee was lodged in December 1991, but no decision was reached by the Committee until April 1994. Additionally, although federal legislation was passed in November 1994, the High Court did not render judgment on the preliminary issues of the case until February 1997. In May 1997, the Tasmanian Parliament finally relented and repealed the offending laws; nearly 6 years had passed since the communication was lodged, and almost 10 years had passed since the TGLRG began its campaign. In part this is because, in the Australian context, international law is of limited use where there is no political will to implement it, as it is not directly applicable in Australian law. International legal norms are given effect only after lengthy law reform processes and, in many instances, lengthy court cases.

A third point to note is that those of us involved in the case saw the courts as a last resort – partly because they were not available at many stages of the battle, but more so because legislative reform was seen as the ultimate goal. Furthermore, even when the

---

<sup>85</sup> A (name deleted) v. Australia, Comm. No. 560/1993, U.N. GAOR, Hum. Rts. Comm'n., 59th Sess., U.N.Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997).

<sup>86</sup> See Janine MacDonald, *Australia Rejects Ruling on Asylum Seeker*, THE AGE, Dec. 18, 1997, at A10.

courts were involved, the effect the case had on public perceptions and prejudices surrounding lesbian and gay sexuality was as important as the legal outcome. Courts can provide a useful forum through which to gain media coverage and thus gain opportunities to raise awareness of the position of lesbians and gay men in society.

Because of this broader focus, publicity was very important to the TGLRG. Mr. Croome and Mr. Toonen wanted to hold press conferences and distribute media bulletins at all stages of the case in order to get as much political mileage from the process as possible. To a United States audience, this may sound quite straightforward, but this is not the usual way cases are run in Australia, and the barristers representing the plaintiffs found it a little disturbing.

Fourth, the composition of the legal team for the domestic litigation in the *Toonen* case is of some interest. In Australia, a plaintiff usually employs a solicitor who prepares the case and a barrister who argues the case in court. In *Toonen*, instead of solicitors preparing the case, this work was undertaken by two academic lawyers—Wayne Morgan and myself.<sup>87</sup> This was done in order to keep as much of the process within the gay and lesbian community as possible and, in the absence of an organization such as the Lambda Legal Defense and Education Fund, this was the best way to achieve that goal. As queer lawyers, Mr. Morgan and I could, in a way, see both sides—the doctrinal arguments and the activist strategies. We could also translate the legal arguments into plainer language for the “clients,” the TGLRG, so that at all times the plaintiffs understood what was happening and what their options were. Therefore, the plaintiffs could exercise a degree of control over the proceedings rather than simply ceding control to the lawyers. Additionally, we could translate the clients’ concerns to the lawyers.

One of these client concerns was that the court hear the various experiences of discrimination that lesbians and gay men experienced in Tasmania. The rules of evidence did not permit extensive information about individuals other than the plaintiffs, but we did succeed in presenting the stories of Mr. Croome and Mr. Toonen to the court in order to place them on the public record. It was clear that they had a persuasive effect on at least some members of the court, both during oral arguments and when the judgment on standing was handed down.

---

<sup>87</sup> For legal reasons, there were solicitors on the court record, however they were not involved in preparing the arguments or briefing the barristers.



In keeping with the TGLRG's mandate, we were also keen to have lesbians involved in the case. Even though the legislation did not criminalize lesbian sex, it was clear that lesbians in Tasmania experienced prejudice, discrimination, and stigmatization as a result of the effects of the legislation. This was partly because in the public mind the legislation criminalized all "homosexual" sex and partly because of the tendency of homophobia to include both lesbians and gay men. We contemplated a lesbian plaintiff on this basis, but decided that it would simply be too difficult for a court to perceive the harm done to lesbians by the criminalization of gay male sex. However, there were lesbian activists involved through the TGLRG, and I provided the lesbian content on the legal team.

## VI. CONCLUSION

In the *Toonen* case, international human rights law was crucial in achieving legal change in Australia. The process was slow, but ultimately we succeeded. Whether human rights law will be of the same use in other cases, or in other countries, is by no means guaranteed. In the area of sexuality there is no international convention that makes specific reference to sexual preference. Therefore, we have to make creative arguments that may not always work. The Human Rights Committee's views in *Toonen* make this task much easier. However, even in a jurisdiction with a reasonable record on sexuality issues, such as Europe, the European Court of Justice recently declined to offer protection from discrimination to lesbians and gay men,<sup>88</sup> indicating that there is still a battle ahead.

In the U.S. context, I am less qualified to assess the prospects for successful use of international human rights norms.<sup>89</sup> However, a number of things indicate that any optimism should be cautious. First, the U.S. has not signed the First Optional Protocol to the ICCPR, which means that individuals in the U.S. cannot take cases to the United Nations Human Rights Committee.<sup>90</sup> Second, although the ICCPR has been ratified by the U.S., it is not self-

---

<sup>88</sup> See Case C-249/96, *Grant v. South-West Trains Ltd.* (Feb. 17, 1998) (stating that a prohibition of sex discrimination does not apply to differential treatment on the basis of the sex of a person's sexual partner; the latter was characterized as sexual orientation discrimination, which is not prohibited by European Community Law).

<sup>89</sup> Others have done so post-*Toonen*, however; see, e.g., James D. Willets, *Using International Law to Vindicate the Civil Rights of Gays and Lesbians in United States Courts*, 27 COLUM. HUM. RTS. L. REV. 33 (1995); Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-On Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725 (1995).

<sup>90</sup> U.N. Information Service, Press Release: Human Rights Committee concludes Fifty-Fifth Session at Geneva, 16 Oct. - 3 Nov., U.N. Doc. HR/CT/448 (1995).

executing and thus requires legislative action to give effect to it in U.S. law. Third, the continued existence of *Bowers v. Hardwick*<sup>91</sup> makes arguments for rights in the area of sexual preference difficult, though *Romer v. Evans*<sup>92</sup> indicates that such arguments are not impossible. Finally, U.S. courts have not, with some exceptions, been particularly willing to use international decisions.

We ought not to see international human rights law and international fora as simple solutions to human rights problems. However, these are not reasons to avoid these tools altogether. I do not wish to downplay the potential of applying international human rights law to struggles in the domestic arena. Rather, I simply intend to sound a note of caution. The *Toonen* case itself provides a story with a happy ending: proof that international human rights law can be very useful in combating local human rights violations.

---

<sup>91</sup> 478 U.S. 186 (1986).

<sup>92</sup> 517 U.S. 620 (1996).

