
**Toonen v. Australia, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992
(1994).**

International Covenant
on Civil and Political Rights

Distr.
RESTRICTED */

CCPR/C/50/D/488/1992
4 April 1994

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Fiftieth session

VIEWS
Communication No. 488/1992

Submitted by: Nicholas Toonen
Victim: The author
State party: Australia
Date of communication: 25 December 1991 (initial submission)
Prior decisions:
Documentation references: - CCPR/C/WG/44/D/488/1992 (Working Group's rule 91 decision, dated 10 April 1992)
- CCPR/C/46/D/488/1992 (Decision on admissibility, dated 5 November 1992)
Date of adoption of Views: 31 March 1994

On 31 March 1994, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights in respect of communication No. 488/1992. The text of the Views is appended to the present document.

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Views

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 (TGLRG) and claims to be a victim of violations by Australia of articles 2, paragraphs 1, 17 and 26 of the International Covenant on Civil and Political Rights.

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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 contacts between men, including all forms of sexual contacts 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), (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), (c) and 123 of the Criminal Code.

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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.

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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".

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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 Inasmuch 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), (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".⁽⁴⁾

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 Australian Government 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(3)(a) of the Covenant, the author, 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), (c) and 123 of the Tasmanian Criminal Code.

11. Since the Committee has found a violation of Mr. Toonen's rights under articles 17(1) and 2(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.

