LAW AND CHANGE

IDENTIFYING EVIL FOR WHAT IT IS: TASMANIA, SEXUAL PERVERSITY AND THE UNITED NATIONS

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[The recent United Nations Human Rights Committee decision on Tasmania's anti-gay laws has caused controversy. After describing the decision, this article examines its implications. It argues that the decision is important because of its textual representations of sexuality and because of the Communication's attempt to describe the inherent violence of the Tasmanian laws. The author argues that the Committee should not have based its decision on 'the right to privacy' because this right cannot encompass issues of violence and discrimination.]

INTRODUCTION

> The law cannot make people sexually pure, but it can restrain sexual perversity. Even if it cannot restrain such perversity, it ought to try. Further, even if it can do nothing else it ought to identify evil for what it is.
>
> Ron Cornish, Tasmanian Attorney-General, April 1994[1]

On 31 March 1993, the United Nations Human Rights Committee decided that Tasmania's 'anti-gay' laws should be repealed because they were in breach of Australia's human rights obligations.[2] This decision has many different meanings to different people. Some gay men and lesbians (and others) see it as an important turning point in the battle to win gay 'rights' and equality. Some are less optimistic about the outcome, but see value in the 'Tasmanian issue' for other reasons. Civil libertarians applaud this upholding of the *privacy* of sexuality, so fundamental to personal *freedom*. Most politicians translate it into the language of 'states' rights' and begin the number counting to determine what response will best suit their popularity. Homophobes see it as the end of civilisation itself, and vow to defend the existing laws to the bitter end.

But whatever view is taken, the importance of the decision should not be presumed to lie merely in the outcome of decriminalisation (which in any event is not yet achieved). The history and process (and future) of the Tasmanian Communication are also important in a number of different respects. One aspect of its importance lies in the opportunity it has given to a Tasmanian group of

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1 As quoted in Andrew Darby, 'Providing "guidance" in an age of moral uncertainty', *The Age* (Melbourne), 16 April 1994.

2 United Nations Human Rights Committee, UN Doc CCPR/C/50/D/488/1992 (31 March 1993) ('The Decision').

gay men and lesbians to tell *their own* stories and by doing so, dispute the law's 'truth' about the 'homosexual'. It is also important as an attempt to describe the *inherent violence* of such anti-gay laws. Also, the process of the Communication has demonstrated and continues to demonstrate the importance of law reform as a site of *cultural intervention.* In this article, I will examine each of these aspects and in light of them, assess the process and outcome of the Communication to be one of strategic value, but also one of missed opportunities.

THE COMMUNICATION

There have been many years of heated debate in Tasmania about decriminalisation of 'unnatural sexual intercourse'. A new strategy became available to the Tasmanian Gay and Lesbian Rights Group (TGLRG) when the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) came into force for Australia on 25 December 1991.[3] This Protocol sets out a procedure whereby individuals within Australia can submit a 'Communication' to the United Nations Human Rights Committee, alleging a breach by Australia of its ICCPR obligations. For the Committee to hear a case, the author must be a 'victim' of the alleged violation and must have exhausted domestic remedies.[4] When attempts to reform Tasmania's criminal laws were repeatedly rejected by the Tasmanian upper house, the Legislative Council, an Optional Protocol Communication, 'authored' in the formal sense by Nick Toonen, became the best strategic option to force reform.[5]

The Tasmanian Criminal Code 1924 (the 'Code'), as amended, criminalises all forms of sex between men, at least some (if not all) forms of sex between women, and some forms of sex between men and women. Section 122 of the Code provides:

> Any person who -
>
> (a) has sexual intercourse with any person against the order of nature;

[3] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976) ('ICCPR'). For Australia's instrument of Accession to the Protocol see ATS 1991 No 39. Accession to the Protocol followed a decade of debate between the Commonwealth and State governments. In the end, only the Northern Territory refused to agree to the Protocol: see Alan Rose, 'Commonwealth State Aspects: Implementation of the First Optional Protocol' in Centre for Comparative Constitutional Studies, *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992) 35, 43.

[4] Requirements found in ICCPR, above n 3, First Optional Protocol, arts 1, 2 and 5.

[5] The Tasmanian Gay and Lesbian Rights Group (TGLRG) Communication consists of four submissions to the United Nations Human Rights Committee. The Original Communication dated 25 December 1991 (the 'Original Communication'); a Submission dated 14 July 1992 (the 'Second Submission') in response to a Committee request for clarification on how the laws have personally affected Nick Toonen; A Submission dated 26 January 1993 in response to the Commonwealth's submission on Admissibility; and a final Submission (the 'Final Submission') dated 25 December 1993 in response to the Commonwealth's submission on the Merits. For more background on the Tasmanian case see Rodney Croome, 'Australian Gay Rights Case Goes to the United Nations' (1992) 2 *Australian Gay and Lesbian Law Journal* 55 and 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' (1993) 14 *Australian Year Book of International Law* 277.

(b) has sexual intercourse with an animal; 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.

Section 123 provides:

> 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.

Although these provisions have a decided focus on (homo) male sex acts, s 122 potentially also criminalises lesbian sex, though this has never been decided by Tasmanian law.[6] In fact, the only form of sexual expression clearly not outlawed by s 122 is heterosexual sex involving penetration of the vagina by the penis.[7] The maximum penalty under the section is 21 years jail.

The Communication alleges that these laws violate Australia's obligations under the ICCPR to respect the author's privacy and equality rights. The privacy arguments are based on article 17 of the ICCPR, in conjunction with article 2(1). Article 17 provides:

> 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

Article 2(1) provides:

> 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. (Emphasis added.)

The equality arguments are based on article 26, which 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. (Emphasis added.)

[6] Similar laws have been used to prosecute lesbians in the United States, see Ruthann Robson, *Lesbian (Out) Law* (1992) ch 3 and William Rubenstein (ed), *Lesbians, Gay Men and the Law* (1993) ch 2.

[7] The discursive significance of this representation of 'natural' sexuality is striking. It limits acceptable sexuality to forms centred on procreation, drawing on dominant strands of Christian and/or utilitarian ideas about sex. Such ideas are also linked to gender subordination, see, eg, Sheila Jeffreys, *The Lesbian Heresy* (1993) Introduction and ch 1.

The Communication's Arguments:

The TGLRG argues that Tasmania's 'unnatural sex' laws[8] violate the right to privacy in a number of ways. Firstly, the laws in themselves violate the right 'because they bring private activity into the public domain (... the domain of the legislative, the judicial and the executive arms of government ...)'. Secondly, the laws violate the right because they permit 'the police to enter a household on the suspicion that two consenting adult homosexual men may be committing a criminal offence ... and seize evidence (including private correspondence)'. For the reason that 'there is no gain to society through the enforcement of these laws the ... violations of the right to privacy so outlined can be considered arbitrary'.[9]

Further, the Communication alleges that the impugned laws violate the author's rights to equal protection of the law and his right to live free from discrimination. The Communication argues that in so far as the criminal laws do not prohibit private, consensual sex between adult heterosexuals or lesbians, they make gay men 'unequal before the law and unable to claim the equal protection of the law'.[10] The TGLRG then attempts to draw a direct link between the existence of unnatural sex laws and acts of discrimination and violence against gay men and lesbians. Initially, this is done by describing the many ways in which these laws personally affect the author, Nick Toonen. In their Final Submission, the TGLRG also describes the way in which these laws encourage discrimination and violence against other gay men and lesbians.

The Communication describes how the mere presence of such laws contribute to Nick's experiences of low self-image and alienation. He has experienced condemnation, denunciation and vilification from public figures. The laws have also denied him full access to information and support regarding HIV/AIDS prevention. In addition, the laws result in a stigma attaching to gay men which has disadvantaged Nick in employment. He has also faced police harassment in protesting against the laws. By describing these aspects of Nick's life, the Communication attempts to show how these laws result directly in stigmatisation and vilification, as well as the threat of, and actual, physical violence.

Admissibility and Merits:

In November 1992, the Human Rights Committee declared the Communication admissible.[11] Australia did not dispute admissibility (despite a request from the Tasmanian Solicitor-General's office, on behalf of the Tasmanian government, that it be disputed). Importantly, the Committee determined that Nick was a 'victim' of a potential violation of rights and that

[8] The term 'unnatural sex' laws shall be used throughout when referring to the Tasmanian Criminal Code 1924 ss 122 and 123. Also included within the phrase (for the purposes of this article) are all variants of 'sodomy laws' which now exist in the United States and in Commonwealth countries.

[9] All quotes in this paragraph are from the Original Communication, above n 5, 16.

[10] Ibid 22.

[11] United Nations Human Rights Committee, UN Doc CCPR/C/46/D/488/1992 (1992).

the Commonwealth should therefore be asked its views on the merits of the case. Once again, the Commonwealth consulted with Tasmania. The Tasmanian government, in a brief response stated that it would wish the Commonwealth to defend the laws as necessary for the protection of public health and public morals.[12] The Commonwealth declined to make these submissions.

Instead, the Commonwealth accepted that the laws were an arbitrary interference with the author's right to privacy and requested the Committee's guidance as to whether the laws also breached the equality rights set out in the ICCPR. On this latter point, the Commonwealth's hesitation concerned whether sexual orientation amounts to a 'status' for the purposes of the equality and non-discrimination provisions of the ICCPR. In regard to this, the Commonwealth sought the Committee's guidance. However, the Commonwealth accepted that s 123 does discriminate on the basis of sex and also accepted that any discriminatory aspect to the impugned laws could not be justified on public health or moral grounds.[13]

Perhaps the major point of disagreement between the Commonwealth's submissions and the TGLRG Communication concerns the link between the existence of these criminal laws and more general acts of discrimination suffered by Nick, and other gay men and lesbians. The Commonwealth repeated at a number of points in its submission that it was not able to ascertain whether all the particular instances of discrimination cited were traceable to the effect of the Tasmanian laws.

The Decision:

The Committee stated its views on the merits of the case on 31 March 1994.[14] The members of the Committee were unanimous in their view that s 122(a) and (c) and s 123 of the Tasmanian Code should be repealed. An Individual Opinion was appended to the decision by the Swedish member, Mr Wennergren, who differed in his reasoning to the other members. The majority found that the laws were in breach of the right to privacy and rejected the Tasmanian government's arguments that the laws could be justified on health and moral grounds. The majority did not find it necessary to consider whether the equality right had also been breached, and it was on this point that Mr Wennergren disagreed. However, despite refusing to rule specifically on article 26, the Committee made an important finding about this article and article 2(1). The majority states:

> The State party has sought 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,

[12] Letter dated 18 May 1993 from Mr Simon Allston, Senior Crown Counsel, Office of the Solicitor-General of Tasmania to Mr G A Mowbray, Attorney-General's Department, Canberra.

[13] Commonwealth, Submission By the Australian Government on the Merits of the Communication (September 1993).

[14] The Decision, above n 2.

paragraph 1, and 26 is to be taken as including sexual orientation.[15]

Domestic and International Implications:

The Decision requires Tasmania to repeal, or the Commonwealth to override, the specific laws attacked. At the time of writing, the Tasmanian government was maintaining its refusal to decriminalise, squarely raising federal intervention. Further, the same government maintains it will challenge any federal legislation in the High Court.[16] However, the Committee's decision also has broader domestic ramifications. It provides a powerful argument for Australian gay and lesbian groups to use when they intervene in legal discourse and argumentation, generally.[17] The finding on article 2(1) makes clear for the first time that State parties must ensure that *all* of the rights set out in the ICCPR apply to *all* people without distinction on the basis of sexuality: rights such as freedom of expression, rights to association, rights to family life and marriage, as well as the general equality right. There are many laws and practices within Australia which deny these rights to lesbians and gay men.

The decision also has a variety of meanings at the international level. Firstly, it allows gay men and lesbians from other countries which have similar sex laws and which are parties to the Optional Protocol to immediately challenge them. This would include Algeria, Cyprus, Ecuador, Jamaica, Libya, Nicaragua and Zaïre. Secondly, it provides gay men and lesbians from countries which are parties to the ICCPR but not to the Protocol, with strong human rights arguments to continually embarrass their governments. Significantly, this includes the United States where discrimination and violence against gay men and lesbians is rife and where approximately half the states retain some form of

[15] Ibid para 8.7.

[16] Such a challenge is, legally, a pointless exercise because of the High Court's very broad interpretation of the external affairs power. The broad scope of the external affairs power has been established beyond challenge in a series of High Court cases over the past decade. See *Koowarta v Bjelke Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*Dams* case); *Richardson v Forestry Commission* (1988) 164 CLR 261 (*Lemonthyme* case); *Queensland v Commonwealth* (1989) 167 CLR 232 (*Queensland Rainforest* case); *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (*War Crimes* case). Despite this, a High Court challenge may be perceived as politically necessary by the Tasmanian government, so as to appease its right-wing power base.

[17] Currently gay and lesbian groups in Australia are fighting a number of legal battles. These include battles surrounding discriminatory age of consent provisions (in WA, NSW, and NT). Coverage in anti-discrimination and industrial relations legislation is also the subject of lobbying. For example, Gay men and Lesbians against Discrimination (GLAD), a gay and lesbian lobby group in Melbourne, have been fighting for amendments to equal opportunity legislation in Victoria since 1990, see GLAD, *Not a Day Goes By: Report on the GLAD Survey into Discrimination and Violence Against Lesbians and Gay Men in Victoria* (1994). The Australian Council for Lesbian and Gay Rights is currently involved in a test case to establish the meaning of 'family' for industrial relations law purposes. Another battle is being fought concerning equal treatment in the federal public service (which was put before Cabinet but rejected in late 1992). Recognition of gay and lesbian relationships has recently been achieved in the Domestic Relationships Act 1994 (ACT) (legislation concerning *de facto* relationships), and has also been proposed in Queensland, see Queensland Law Reform Commission, Discussion Paper No 36: Shared Property (1991). Such recognition is also under discussion in New South Wales, see Gay and Lesbian Rights Lobby, *The Bride War Pink* (1993). Other legal battles include those surrounding the custody and adoption of children, access to reproductive technology, and violent and discriminatory police practices. Also note that this does not exhaust the list of current gay and/or lesbian legal battles.

unnatural sex law. Thirdly, and at its most general, the decision will add to the growing corpus of international human rights law dealing with gay and lesbian issues.[18]

STORYTELLING AND IDENTITY: AN EXAMPLE OF 'DEVIANT' VOICE DISPUTING LAW'S TRUTH

Having described the 'legal' arguments and implications of the case, I would suggest that these aspects are only a small part of its importance. What was it that the TGLRG hoped to achieve? Was (is) the dispute really about what the law says people can and cannot do in their bedrooms? Decriminalisation was not the one and only goal for the TGLRG. What the TGLRG sought to do, in a sense, was broaden the concept of what it means to be Tasmanian. They wanted to tell the story of the pointless abuse which is suffered, and lay the blame for that abuse where it really belongs: at the feet of those institutions whose powerful voices incite hatred, discrimination and violence. 'The law' is one of those institutions which constructs and defines 'the homosexual' and in doing so, sends very clear messages about the worth of those it labels with this identity.

Different stories about 'homosexuality' are told by legal actors (lawyers, judges, politicians). Using the official voices of legal institutions (courts, parliaments) these stories are very clear about the dangers: the sin, sickness and disorder, inherent in homosex. There is now a wealth of literature exploring why homosex is demonised in this way through a variety of discourses.[19] This literature suggests that sexuality itself is seen as a potential threat to state-sanctioned order and that anti-gay and lesbian violence constitutes one of the disciplinary mechanisms that enable social control of all human bodies and identities. Although beyond the scope of this article, the construction of the *threat*, of the *danger* inherent in homosex is present in many legal commentaries, cases, and legislation.[20]

[18] The European Court of Human Rights has invalidated unnatural sex laws twice in *Dudgeon v United Kingdom* (1981) 4 EHRR 149 and *Norris v Ireland* (1989) 13 EHRR 186. Institutions within the European system have been the most active international institutions in dealing with sexuality issues, see Kees Waaldijk and Andrew Clapham, *Homosexuality: A European Community Issue* (1993) and Peter Tatchell, *Europe in the Pink* (1992). The United Nations World Conference on Human Rights held in 1993 was the first UN Conference to have a visible lesbian and gay presence. Also in 1993, the International Lesbian and Gay Association ('ILGA') was granted Non-Government Organisation ('NGO') consultative status with the Economic and Social Council ('ECOSOC'). See ILGA, *The Start of a Process: Report of the ILGA Committee on the UN Conference on Human Rights* (July 1993).

[19] For an excellent selection of readings, see Henry Abelove *et al* (eds), *The Lesbian and Gay Studies Reader* (1993). See generally Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain, from the Nineteenth Century to the Present* (1977) and *Sex, Politics and Society: The Regulation of Sexuality Since 1800* (1981); John D'Emilio, *Sexual Politics, Sexual Communities: The Making of a Homosexual Minority in the United States, 1940-1970* (1983). See also Eve Kosofsky Sedgwick, *Epistemology of the Closet* (1990); Cherry Smyth, *Lesbian's Talk Queer Notions* (1992); the essays collected in (1991) 3 *Differences: A Journal of Feminist Cultural Studies* and Michael Warner (ed), *Fear of a Queer Planet* (1993).

[20] For examples see Wayne Morgan, 'Queerlaw' (1994) 5 *Australasian Gay and Lesbian Law Journal* (forthcoming).

The demands made by various institutional discourses in the representation of sexuality have been well documented. Indeed, the perception of sexuality as a threat to order (and hence the state) has a long history. For example, Rubin has documented the link in modern conservative discourse between 'immoral sexual behaviour' and putative decline in state power.[21] She has described how Western cultures generally consider sex to be a dangerous, destructive, negative force. Virtually all erotic behaviour is considered bad unless a specific reason to exempt it has been established. Such exemption, as is demonstrated by the Tasmanian Code, usually involves notions of 'legitimate' reproduction, privileging the heterosexual family unit. The multiple discourses constructing (homo)sexuality, both religious and secular, have often been incorporated by states in their criminal law regimes, further privileging heterosex. Within and outside the law, (homo)sexuality is a marked category.

The power and control exercised over individual life depends upon the inculcation of beliefs about hierarchy and the natural ordering of things.[22] Indeed, Iris Young argues that the liberal, positivist tradition of jurisprudence reproduces such hierarchies and leads to the repression of difference.[23] Positivist logic attempts to reduce all concepts to unity. To give a rational account is to find the universal principle which explains.[24] Reason seeks essence, classifications and categories. This inevitably produces definitions couched in terms of oppositions. Things are defined by defining what they are not.[25] This Young (following Adorno) calls 'the logic of identity'.[26] It represses difference. In her words 'the irony of the logic of identity is that by seeking to reduce the differently similar to the same, it turns the merely different into the absolutely other.'[27] These oppositions usually express a hierarchy: good/bad, normal/deviant, mind/body. Oppression is built into them. The homo/hetero binary analytic performs the same function. Homosex is the 'other' of heterosex, and since heterosex is good, normal and one of the assumptions upon which modern institutions are built, homosex must be bad, deviant and a threat.

These official stories about the *dangerous otherness*[28] of homosex are still dominant in most legal discourses, and this remains the case despite recognition of some gay and lesbian 'rights'.[29] This is a further example of Smart's point

21 Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Abelove *et al* (eds), above n 19, 3.

22 See Anne Barron, 'Legal Discourse and the Colonisation of the Self in the Modern State' in Anthony Carty (ed), *Postmodern Law* (1990) 107.

23 Iris Marion Young, *Justice and the Politics of Difference* (1990) ch 4.

24 Western jurisprudence contains many examples. For example, HLA Hart, *The Concept of Law* (1961) and Ronald Dworkin, *Taking Rights Seriously* (1977).

25 For an explanation of this in terms of Derrida's concepts of *différance* and *trace*, see Morgan, 'Queerlaw', above n 20.

26 Young, above n 23, 98-9.

27 Ibid 99.

28 Phrase drawn from Les Moran, 'Sexual Fix, Sexual Surveillance: Homosexual in Law' in Simon Shepherd and Mick Wallis (eds), *Coming On Strong* (1989) 180, 189.

29 The accuracy of this conclusion has been demonstrated elsewhere: see Morgan, 'Queerlaw', above n 20 and Moran, above n 28. See also Simon Shepherd, 'Gay Sex Spy Orgy: The State's Need for Queers' in Shepherd and Wallis, above n 28, 213.

that law's power does not lie primarily in its outcomes, but in its claim to speak the truth, to 'know' and therefore control.[30] Thus, gay and/or lesbian strategies must involve an attack on those claims to speak the truth.[31] The image of 'homosex' must be disputed in a way that tries to disrupt essentialising truths and avoid the homosex/heterosex binary. It is not a question of whether we deserve *the same rights* as heterosexuals, but a matter of demonstrating institutional responsibility for violence and subordination.

These insights are reflected in the TGLRG Communication. The legal arguments are short. Little time is taken in outlining the distinctions made in law between homos and heteros. There are no arguments that gay men and lesbians deserve *the same rights* because we are *as good as* them. Instead, the Communication concentrates on telling stories about the lives of gay men and lesbians in Tasmania. I have referred above to the ways in which the original Communication told Nick's story. In their Final Submission, the TGLRG broadened this to include other stories about lesbians and gay men. Stories of discrimination in employment and access to services, and stories of violence are told involving eight gay men and three lesbians. In each of these stories, the perpetrators justified their actions by reference to the 'illegality' of homosex in Tasmania.[32] This strategy of focusing on gay and lesbian lives has a close connection with the history of the drafting of the Communication. Although primarily drafted by one person, it was subject to agreement, editing and approval by a successful coalitionist group of lesbians and gay men (the TGLRG).

The Committee's decision speaks of gay and lesbian lives in a more positive way than is usually the case in legal texts. It is thankfully free of most of the negative stereotyping found in legal discourse. In this respect, the Committee's decision does less violence to gay and lesbian lives than the equivalent decision in the *Dudgeon* case[33] by the European Court of Human Rights, where the dissenting judgments amount to vilification and even the majority decision is flavoured with distaste and speaks in the subordinating language of toleration. Nevertheless, in one important respect the Committee did not listen to the voice of the TGLRG.

The TGLRG's submissions were very careful to avoid any discussion of gay and lesbian identity which relied upon a biological or genetic foundation (making us *as good as* heterosexuals). There are, of course, perennial debates

[30] Carol Smart, *Feminism and the Power of Law* (1989), especially ch 1; Carol Smart, 'Law's Truth: Women's Experience' in Regina Graycar (ed), *Dissenting Opinions: Feminist Explorations in Law* (1990).

[31] Jennifer Terry, a queer historian has used the term 'vengeful countersurveillance' to describe her approach to queer historiography. This involves locating the 'deviant voice' usually absent in historical texts: Jennifer Terry, 'Theorizing Deviant Historiography' (1991) 3 *Differences: A Journal of Feminist Cultural Studies* 55. One way of disputing law's truth is by following such a practice when reading legal texts. On queer theory generally, see Lisa Duggan, 'Making It Perfectly Queer' (1992) 22 *Socialist Review* 11 and the references cited above n 19. On queer theory in Australia, see Robert Reynolds, 'Postmodernism and Gay/Queer Identities' in Robert Aldrich (ed), *Gay Perspectives II* (1994) 245.

[32] Final Submission, above n 5, 30-6.

[33] *Dudgeon v United Kingdom* (1981) 4 EHRR 149.

(both within and without gay and lesbian communities) regarding the *causes* of homosex, particularly whether understandings of human sexuality based on a *biological* model are appropriate; indeed, whether homosex is *natural* or *unnatural*.[34] The Committee, in its finding that the word 'sex' in articles 2(1) and 26 should be read as including sexuality, failed to avoid the trap of this 'natural/unnatural' binary opposition.[35] The Committee made this finding, presumably, because of a view that sexuality is a biologically or genetically determined attribute. This is explicitly stated in the individual opinion of Mr Wennergren:

> 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 that view, as the common denominator for the grounds 'race, colour and sex' are biological or genetic factors.[36]

By privileging the 'natural' in this way, the Committee feeds back into invidious comparisons (very familiar in legal 'rights' discourse). Once again the language of sameness/difference is used. Are we now to assume that as female is to male, so homosex is to heterosex? Are questions of the 'rights' of homosexuals now going to proceed along the lines of principles developed in the context of sex discrimination? Many would argue that these rules are problematic in their own context and are inappropriate considering that subordination on the basis of a different sexuality is not the same as subordination on the basis of gender (despite the obvious intersections).[37]

The Communication and the decision are also less than satisfactory in the stories they tell (or do not tell) about lesbians and unnatural sex laws. Ruthann Robson, writing about lesbians in the United States, has described the way in which such laws (which she calls the 'lesbian sex statutes'), on their face often cover lesbian sex.[38] She notes reported prosecutions of lesbian sex as recently as 1968. Further, she points out aspects of these laws which do a different kind of harm to lesbians than the kind they do to gay men. Most of these statutes criminalise lesbian sex whilst at the same time *erasing* lesbianism. They do this by being capable of covering lesbian sexual expression whilst centring male sexuality in the text of the provisions. In her words 'these laws domesticate us with their paradoxical message: our sexuality is not worthy of inclusion within

[34] The current revival of biological determinism regarding sexuality received substantial media coverage during 1993, see, eg, Gareth Boreham, 'Gay men may spring from mother's genes', *The Age* (Melbourne), 17 July 1993; Steve Connor and Tom Wilkie, 'Genes and Sex', *The Age* (Melbourne), 20 July 1993; Editorial, 'Science and Morality', *The Age* (Melbourne), 22 July 1993; Philippa Hawker, 'On sex, jeans and Cultural Difference' *The Age* (Melbourne), 19 August 1993 (reviewing ABC TV Series 'The Opposite Sex'); Adam Carr, 'Born Gay?' *Outrage* (April 1993) 13.

[35] This finding evidences a disturbing misunderstanding of human subjectivity (from a Lacanian or poststructural perspective), see Robert Reynolds, above n 31.

[36] The Decision, above n 2, 12.

[37] On the interactions between lesbian theory and feminism, see, eg, Ruthann Robson, 'Lifting Belly: Privacy, Sexuality and Lesbianism' (1990) 12 *Women's Rights Law Reporter* 177.

[38] Robson, *Lesbian (Out)Law*, above n 6, ch 3: 'Crimes of Lesbian Sex'.

any legal text; our sexuality is worthy only of being criminalised'.[39]

A similar reading could be given to the Tasmanian laws. However, the Communication itself seems to be ambivalent in its positioning of lesbians. In the first three of the TGLRG's submissions, lesbianism is not very 'present' (lesbians are hardly mentioned). The only time the word 'lesbian' appears without being in conjunction with the words 'gay men', is in the following quote from the Australian Federation of the Family, Tasmanian Branch, (used by the TGLRG as an example of public statements on homosex): '... lesbians reported double the number of auto accidents as compared to normal women.'[40] The Communication's general silence concerning lesbians and unnatural sex laws is perhaps understandable given that the context of such laws is usually seen to be the regulation of gay men. However, by emphasising the impact unnatural sex laws have on lesbians, the Communication could have strengthened its own arguments about these laws' pervasive effects.

This failing is cured somewhat by the Final Submission, which uses some lesbian stories to establish the link between unnatural sex laws and subordination. It tells the story of a lesbian who was sacked and then forced to take a meagre financial settlement, because of the 'illegal' status of homosexuality in Tasmania. It also relates the story of two lesbians who could not get their relationship taken into account by the Department of Social Security because 'it's illegal in Tasmania'.[41] Lesbians are mentioned in the official text of the Committee's decision, but only peripherally. The Committee uses the phrase 'homosexual men and women' twice, and the phrase 'homosexuals and lesbians' twice.[42] Given the general silence which exists in law concerning lesbianism, the very words used, and how often they are used, become crucial in mapping the stories told and untold about sexuality.

Although the Committee did not tread carefully enough in this messy field of identity politics, some of the TGLRG's 'different voice' did make it through to the official text of the Committee's view. The official text thus acts as both a transmitter of the TGLRG's story to a wider audience, and also a type of legitimisation vehicle, giving that story more power than it would otherwise have in many arenas. In fact, a large proportion of the TGLRG story can be found in the Committee's words. The majority decision is 12 pages, only two of which are the operative part. The rest is a detailed recording of the history and arguments in the case, with many of the TGLRG's stories concerning the links between unnatural sex laws and subordination repeated. It is these stories that describe the power which unnatural sex laws exercise. They show that the law's violent 'truth' about homosex cannot be separated from the violent and discriminatory acts of 'private' individuals.

[39] Ibid 57.
[40] Second Submission, above n 5, 16.
[41] Final Submission, above n 5, 32 and 35.
[42] The Decision, above n 2, 3, 4 and 10.

DESCRIBING POWER: THE INHERENT VIOLENCE OF, AND THE VIOLENCE CAUSED BY, UNNATURAL SEX LAWS

As described above, the TGLRG Communication maps some of the ways in which unnatural sex laws participate in violence and discrimination against lesbians and gay men. Yet, in order to get anyone to listen to their stories of discrimination and violence, the TGLRG has been forced to argue within juridical categories of 'privacy' and (formal) 'equality'. Their stories do not fit within these categories. The Communication, in reality, is about what is *done to* gay men and lesbians, not about what *we do* in our bedrooms. The problem can be seen as a descriptive one. How do you describe in a way that is legally cognisable, the structural nature of the harm done to lesbians and gay men by the existence of unnatural sex laws? Attempting to address, by legal means, what is *done to* gay men and lesbians forces us to argue within paradigms which, at least as currently conceived, can never really address the problem. The Committee's decision, based on a western, juridical category of privacy, suffers from these flaws.

Decisions based on a 'right to privacy' are incapable of describing the power exercised by unnatural sex laws. 'Privacy' cannot provide an analytic structure to theorise power. The last two decades have seen critical theorists in many disciplines emphasise the importance of analyses of power.[43] They have pointed out that power has many sources, is exercised in different forms through different mechanisms and is held and utilised by many different actors. Building on these insights, they claim that it is no longer adequate to theorise power as a force exercised by 'the state' through 'the law'. They point out that 'the state' cannot be theorised as a monolithic, unitary entity which is the single source of authoritative regulation. Similarly, 'the law' is not a unitary system that is stable and coherent. In any area of law, for example, the regulation of sexuality, laws and practices develop in a particular cultural context, in response to different concerns and the desires of diverse pressure groups.

Further, they point out that law itself is only one regulatory discourse among many. Modern 'government' should be understood in terms of those networks of power which normalise populations through a vast variety of popular and institutional discourses and practices. Sexuality is constructed and produced through such a variety. Power over sexuality is exercised in many contexts, ranging from children's stories in the playground, through to religious and medical stories legitimised by claims to moral authority, expertise and knowledge. This multiplicity of power is evident in the history and process of the TGLRG Communication, where the range of players at this site of contestation is extraordinary.

Since 1989, four community groups have formed in Tasmania solely for the purpose of opposing gay law reform. These are FACT (For A Caring

[43] For examples in legal discourse see Barron, above n 22; Nikolas Rose, 'Beyond the Public/Private Division: Law, Power and the Family' (1987) 4 *Journal of Law and Society* 61. See also Margaret Davies, *Asking the Law Question* (1994) chh 7 and 8.

Tasmania), CRAMP (Concerned Residents Against Moral Pollution), HALO (Homophobic Activists Liberation Organisation) and TAS ALERT. These groups have distributed vast amounts of propaganda, organised public meetings and lobbied politicians, highlighting the degree of threat perceived by the conservative right in Tasmania, especially in the North West.[44] In fact, HALO even sent its own submission to the Human Rights Committee on the TGLRG case. 'The law' itself has spoken in many different voices on the issue of decriminalisation (further demonstrating its fragmentary nature). These range from Tasmanian government sponsored decriminalisation bills (under the Labor-Green government elected in 1988), through to vitriolic anti-gay debates in the Tasmanian Legislative Council, Federal government policy on decriminalisation and HIV/AIDS strategy, and reports by the Commonwealth Human Rights and Equal Opportunity Commission regarding the Human Rights obligations involved. The TGLRG case demonstrates once again that 'law' is a site of contestation, at which diverse discourses contend.

Accepting these insights about networks of power, it is no longer adequate to theorise unnatural sex laws simply in terms of a repressive exercise by the state of its power. The ways in which such laws participate in the creation and governance of human sexuality must be mapped, without assuming that they are necessarily determinative. The TGLRG Communication can be read as an attempt to describe the way in which unnatural sex laws participate in the construction of sexuality. It does this by establishing the links between such laws and 'private' acts of discrimination and violence.

The rhetoric of international human rights law is directed at holding state actors: that is 'governments', responsible when they commit breaches of their citizens' human rights. Traditionally, states are not responsible for human rights abuses if those abuses are committed by 'private' citizens. However, this artificial dichotomy masks the way that power works in modern western societies. It ignores the way in which state institutions participate in constructing the reality they control.[45] In the words of Foucault:

> I don't think we should consider the modern state as an entity which has developed above individuals, ignoring what they are and even their very existence, but on the contrary as a very sophisticated structure, in which individuals can be integrated, under one condition: that this individuality would be shaped in a new form, and submitted to a set of very specific patterns.[46]

The forms of power exercised by the institutions of the modern liberal state enter all spheres of life to influence (construct) the world view of its citizens. Although these forms may not be determinative of that world view, they nevertheless participate substantially in its construction. In the context of unnatural sex laws, state institutions participate in demonising sexual difference and by doing so legitimate 'private' discrimination and violence.

[44] See Croome, above n 5.

[45] See Barron, above n 22.

[46] Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds), *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982) 208, 214.

I would suggest that there are two reasons why arguments about the status of gay men and lesbians are framed by decision-makers within a discourse of privacy. Firstly, by locating sexuality within *privacy* courts and tribunals can maintain and reinforce their stories about the *dangerousness* of homosex (even while recognising that gay men and lesbians do have 'rights'). Secondly, privacy jurisprudence allows decision-makers to avoid grappling with the problem of the many forms of violence faced by lesbians and gay men. Together, these two aspects demonstrate that privacy jurisprudence is an effective vantage point within a liberal legal framework from which to control sexuality.

The concept of privacy is used by western legal actors and commentators in many different ways.[47] The notion of a private sphere of life, a sphere that is none of the law's business, became central to liberal philosophy. Its power can be traced through the works of Locke and Mill (among others) until it comes to represent one of the organising principles in western liberal jurisprudence. However, like most such principles, *privacy* has no determinate content in law. It is a concept employed to legitimise shifting boundaries between different forms of regulation. It is employed to present the 'public' as the sphere of legitimate regulation, and the 'private' as the sphere of freedom, autonomy and choice. It is also employed to reinforce views of the 'public' as the sphere of the market, of individualism, competition, politics and the state; with the 'private' as the intimate sphere, altruistic and humanitarian.

Many feminists and critical theorists have critiqued the public/private dichotomy. They point out that the 'private', far from being unregulated, is often regulated by 'informal' mechanisms which represent a delegation of public power. The institutions of the state are often involved in such 'policy' decisions which entail informal regulation of the 'private', through fiscal, employment and tax policies, social security law, family law, laws about rape in marriage, etc. Institutions of the state encourage and allow other forms of power to operate within the 'private', and these other forms of power are often enforced by state-imposed sanctions (or lack thereof). To many feminists, the primary function of the public/private dichotomy is to reinforce male control over women. However, the dichotomy also masks other power relations. The very notion of privacy mystifies the extent to which that which goes on within this shifting sphere is constructed and controlled by state institutions and other powerful discourses.

The feminist critique of the public/private dichotomy should sound warning bells for any decision maker who attempts to base 'rights' on the shifting and

[47] See, eg, Katherine O'Donovan, *Sexual Divisions in Law* (1985); Morton Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *University of Pennsylvania Law Review* 1423; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990) 30-40; cf Nikolas Rose, above n 43. On the public/private dichotomy in international law see, for example, Christine Chinkin, Hilary Charlesworth and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 and Hilary Charlesworth, 'The Public/Private Distinction and the Right to Development in International Law' (1992) 12 *Australian Year Book of International Law* 190.

uncertain grounds of 'privacy'. Just as concepts of the 'private' are often used to subordinate women, so also concepts of 'privacy' may mask the ways in which the subordination of others whose rights are associated with this sphere is achieved. The Committee's decision, based on the right to privacy (with its attendant metaphors of freedom and non-regulation) obscures the link between legal discourses on homosex and 'private' acts of discrimination and violence.

By naming sexuality an issue of *privacy*, the Committee's decision reinforces the popular view that sexual difference is a matter not to be spoken of, something which is intimate and *no-one else's business*. Such a view disempowers gay men and lesbians: our sexuality has no acceptable public face. This reminds me of a statement made by Nick in response to a journalist's question. Given his notoriety, asked the reporter, he couldn't possibly claim to be living in fear of jail? Nick replied 'It's fine for me. *It's a very powerful thing to be open and out.* But it's not OK for other gay people living in Tasmania who aren't in that situation'[48] (emphasis added).

What needs to be pointed out here is that the *privacy* of homosex does not mean that there is *no* public discourse about it, but it does mean that voices which contradict the views expressed by institutional voices (like law) are usually silenced.[49] Thus, legal actors continue to produce their stories about the *dangerous otherness* of homosex, whilst silencing other views by naming them *private*. In Foucauldian terms, privacy jurisprudence is part of the explosion of institutional discourse about sex, which defines, scrutinises and controls those who are labelled with a gay or lesbian identity. It is a mechanism of disciplinary power utilised by state institutions to create a cohesive social body which is, in turn, the condition for those institutions' own existence. Homosex is private, secret, silenced. Heterosex is public, acceptable, normal.

These very institutional voices, which cannot be contradicted because of the 'privacy' of homosex, legitimate informal control via discrimination and violence committed by 'private' citizens. The Communication emphasised the way in which the 'official' view of homosex (in this context the criminal law), constructs (at least partially) the popular view and is therefore directly linked to the violence and discrimination to which gay men and lesbians are subjected. After all, criminals deserve what they get. In this way repressive and normalising forms of power can happily operate within the sphere of the 'private' whilst silencing those imprisoned by it. The state, through its laws (not just unnatural sex laws either), is thus directly responsible for the violence which contests sexual difference in all spheres of life.

Kendall Thomas argues that the social voice of homophobia is deeply inscribed in the institutional voices of the law.[50] There are many laws which ascribe an inferior status to lesbians and gay men. Thomas suggests that such laws are inseparable from the actual methods by which the social control of gay

[48] As quoted in Andrew Darby, 'Tasmania: out of the closet and into fear', *The Age* (Melbourne), 16 April 1994.

[49] See generally Michel Foucault, *The History of Sexuality Volume 1: An Introduction* (1978).

[50] Kendall Thomas, 'Beyond the Privacy Principle' (1992) 92 *Columbia Law Review* 1431, 1441.

men and lesbians is undertaken and achieved.[51] The violence and discrimination which flow from the existence of unnatural sex laws (the constructed reality in which these laws participate) involve questions of institutional power which 'the right to privacy' ignores.

The members of the Human Rights Committee missed this opportunity to describe the networks of power surrounding unnatural sex laws. They failed to name the harm done by such laws: the harm of creating the conditions in which discrimination and violence are institutionalised. The decision does talk of the ways in which Nick is 'actually and currently affected' by the laws,[52] but only in the sense that he may possibly be subject to prosecution under them. This does not name the harm. However, note that the TGLRG's arguments concerning the links between unnatural sex laws, discrimination and violence are recounted by the Committee in their description of the case. Thus, the text can be read as still transmitting this 'truth', albeit without the added power of the Committee's own endorsement.

The admissibility decision is valuable for its recognition of the wider cultural impact of unnatural sex laws, it goes some (minor) way to more appropriately naming the harm. The Committee stated:

> The Committee notes that the provisions challenged by the author have not been enforced by the judicial authorities of Tasmania for a number of years. In this respect, it considers that the author has 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 have affected him and continue to affect him personally*, and that they may raise issues under articles 17 and 26 of the Covenant. Accordingly, the Committee is satisfied that the author can be deemed a victim within the meaning of article 1 of the Optional Protocol.[53] (Emphasis added.)

The Committee should have followed this promising start in their final views. The Committee members failed to recognise that unnatural sex laws are an aspect of the institutional subordination of lesbians and gay men, with its attendant violence and discrimination. Such recognition places unnatural sex laws where they juridically belong, within discourses about equality. Of course, a decision based on article 26 may not have taken account of institutional subordination in any event, given the rather formal way in which the Committee tends to interpret the notion of equality.[54] But even a decision based

[51] Ibid.

[52] The Decision, above n 2, 9.

[53] Admissibility Decision, above n 11, 5.

[54] See Hilary Charlesworth, 'Equality and Non-Discrimination under the Optional Protocol' in Centre for Comparative Constitutional Studies, above n 3, 51. Further problems with a traditional analysis of the equality right concern issues of causation. This is demonstrated by the Commonwealth's submission on the merits (see above n 13). The Commonwealth stated that it was not able to ascertain whether all the particular instances of discrimination cited were traceable to the effect of the Tasmanian laws. Here we see the disqualifying power of institutional legal discourse at work. The Commonwealth (and, potentially, other decision makers) can mask the inherent violence of unnatural sex laws, and the obvious link between such laws and subordination, by relying on strict legal notions of causation. Indeed, equality arguments may be so compromised because of such formal notions that they cease to be sites of meaningful contestation. Foucault suggests that notions

on formal notions of equality would have been more productive than one based on privacy, in terms of providing gay men and lesbians with better rhetorical arguments in their struggles against homophobia.[55]

Instead, by analysing unnatural sex laws within the paradigms and ideological limits set by the juridical discourse of 'privacy', decision-makers, like the Committee members, restrain and contain 'deviant' sexual identities within a sphere constructed as powerless. In gay and lesbian terms, the sphere of the 'closet'. As long as contested sexual identities are kept closeted, secret, private; as long as gay men and lesbians appear as straight, no damage is done to the unitary, hegemonic construction of heterosexuality dominant in popular and institutional discourse.

CULTURAL INTERVENTION: THE VALUE OF LAW REFORM

The Communication directly raises questions of political praxis (strategy).[56] What is our goal in seeking law reform? Do we think that changing legal texts will improve the lives of lesbians and gay men? The answer commonly given to this (especially by those who argue for 'gay rights') is that law reform sends a message to people in society that it is unacceptable to treat gay men and lesbians as inferior. This may be true in a limited formal sense, but it cannot be put any higher than that. As briefly indicated here, despite formal reforms, in most cases 'the law' continues to speak of homosex in terms of *dangerous otherness*. Thus it is not the outcome of law reform that is of sole (or even primary) importance. The importance of law reform lies in its power as a site at which lesbians and gay men can intervene in popular cultural discourses and dispute institutional discourses about homosex.

This has direct consequences for the way in which 'law reform' should proceed. Traditionally, many gay and lesbian rights activists have focused on the outcome of law reform to the cost of all else. Because the outcome is all-important, these activists say that we must work within the system to convince those with the power to grant us 'rights'. We must wear suits, we must *not* have spiky hair or a nose ring if we expect politicians, lawyers and judges to take us seriously. We must appear to be *just like them*. Reform is achieved by quietly talking to people behind closed doors and hoping that the new law or policy is rushed through before the homophobes get wind of it and produce a public outcry.

This has not been the attitude of the TGLRG. A goal from the beginning was to make this very, very public. The official 'author' was carefully chosen for cultural impact. A Tasmanian born and bred, who intended to remain there, and who didn't mind being very public about his sexuality. Throughout the past five

of formal equality are inseparable from the indispensable 'dark side' of the law, such notions being fundamental to the micro-systems of power which maintain inequality, see Michel Foucault, *Discipline and Punish* (Alan Sheridan translation, Penguin edition, 1977), especially at 222.

55 The individual opinion of Mr Wennergren is informed by such formal notions of equality.

56 For the 'theory' which this section of the article assumes, see for example, the references to Carol Smart, above n 30.

years, TGLRG protests have been very loud and very public. But more importantly, every time there is a meeting called by those groups opposing law reform, the TGLRG is there. The homophobes' truth has been directly and effectively disputed. And if you place any weight on facts and figures, popular views about homosex in Tasmania have been improving at a steady rate.[57]

It wasn't only *reforming the law* that was of importance here, but also *using law reform* as a vehicle by which to make people think about their attitudes to sexuality. The TGLRG strategy of handing signed confessions to the Police in May 1994 was a further example of this.[58] In fact, the public cultural aspects of this case have been so pervasive that at times it has caused a lot of stress to the participants. I remember Rodney Croome saying, a few weeks after the Committee's decision had been released, that it was a relief to open the Tasmanian newspapers 'and not see the G word once'.

If an aspect of law's power lies in its claim to 'speak the truth' (to name, define and control) then at least part of the goal of law reform should be to dispute that 'truth'. This means adopting public, colourful and imaginative ways of telling our own stories. Controversies surrounding law reform are very useful sites for such interventions, as the TGLRG experience demonstrates.

CONCLUSIONS

I do not wish to downplay the importance of the *outcome* in the TGLRG case. Diminishing the power of an inherently homophobic text on the statute books is an important achievement.[59] Nevertheless, as suggested above, the Communication's importance is misread if this aspect becomes the sole focus. The *process* of the Communication, both before and after the Committee's decision, is perhaps of more importance to lesbians and gay men. This process has proven to be a very useful one: it has provided a strategic position from which dominant cultural discourses about homosex can be disputed.

Experience has shown that the outcomes of 'law reform' are of little practical value to lesbians and gay men, when legal actors and institutions continue to speak with homophobic voices. These voices need to be challenged. One way of challenging them is by telling the stories of gay and lesbian lives, and relating gay and lesbian experiences of the way in which legal actors and legal institutions participate in and encourage discrimination and violence against lesbians and gay men. To my mind, this is the lesson society should learn from the TGLRG's struggle to identify 'evil' for what it is.

[57] The TGLRG, and others, have commissioned polls at various stages. According to the TGLRG's Final Submission, above n 5, 37-8, their polling indicated 31% support for decriminalisation in 1988. By November 1993, this had increased to 58%.

[58] See Andrew Darby, 'Gays offer details of sex lives to Hobart police', *The Age* (Melbourne), 12 May 1994; Bruce Montgomery, 'Lovers admit their "crime" in test of Tasmania's anti-gay resolve', *Australian* (Canberra), 12 May 1994.

[59] Unfortunately, federal intervention cannot 'remove' the homophobic text completely, as only the Tasmanian parliament can repeal the law. All the Commonwealth can do is pass inconsistent legislation, to remove any direct consequences flowing from the Tasmanian Criminal Code ss 122 and 123.