

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

REPORT OF THE
HUMAN RIGHTS COMMISSIONER
ON CERTAIN PROVISIONS OF
THE TASMANIAN CRIMINAL CODE

*Human Rights and
Equal Opportunity
Commission*

Commonwealth of Australia

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Human Rights and Equal Opportunity Commission
Sydney. July 1994

**Human Rights and
Equal Opportunity Commission**

Human Rights Commissioner

15 July 1994

The Hon Michael Lavarch, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

I enclose for your consideration a Report relating to Sections 122 (a) and (c) and Section 123 of the Tasmanian Criminal Code.

Yours sincerely

Brian Burdekin
Federal Human Rights Commissioner

CONTENTS

	Page
1 BACKGROUND	1
2 THE TASMANIAN LAWS	2
2.1 Tasmanian Criminal Code Act 1924	2
2.2 Laws In Other Australian States and Territories	4
3 HUMAN RIGHTS	4
3.1 Relevant HREOC Functions Concerning Human Rights	4
3.2 Definition of Human Rights	5
3.3 Applicability of the ICCPR in Australian States and Territories	5
3.4 The Right to a Private Life (ICCPR Article 17)	5
3.5 Arbitrary Interference	6
3.6 Permissible Restrictions	7
3.7 The Tasmanian Government's Case	8
3.7.1 Public Health	9
3.7.2 Moral Grounds	9
3.8 The Prohibition of Discrimination (ICCPR Article 2.1)	15
3.9 Equality Before the Law and Equal Protection of the Law (ICCPR Article 26)	16
4 EQUAL OPPORTUNITY AND TREATMENT IN EMPLOYMENT AND OCCUPATION	18
4.1 HREOC Functions Regarding Equal Opportunity in Employment and Occupation	18
4.2 Meaning of Equality of Opportunity and Treatment in Employment and Occupation	18
CONCLUSIONS	19
6 RECOMMENDATION	19
7 APPENDICES	20
7.1 Mr Toonen's Case in the Human Rights Committee	20
7.2 Letter dated 9 May 1991 to the (then) Attorney-General, the Hon. M. Duffy MP, from the Human Rights Commissioner, Mr Brian Burdekin, concerning the Federal Government's proposal to ban political advertising in the electronic media	22

1 BACKGROUND

Two sections of the Tasmanian Criminal Code (Section 122 (a) and (c) and Section 123) criminalise some forms of sexual activity between males and females and all forms of sexual intercourse between males, including all forms of sexual intercourse and at least some expressions of sexual intimacy between consenting adult homosexual men in private.

Male homosexual acts between consenting adults in private have been decriminalised in the other States of Australia and in the A.C.T. and Northern Territory. Sexual intercourse between persons "against the order of nature" is not proscribed in jurisdictions other than Tasmania. Furthermore, discrimination on the grounds of homosexuality or sexuality is unlawful in three Australian States and in the A.C.T. and Northern Territory.

Australia is internationally accountable for violations of the International Covenant on Civil and Political Rights (ICCPR), including by Federal, State or Territory governments.

On 25 December 1991 Mr Nicholas Toonen, an Australian citizen living in Tasmania, submitted a complaint (technically referred to as a "communication") to the United Nations Human Rights Committee in accordance with the Rules and Procedures in the ICCPR and the First Optional Protocol to the ICCPR. Mr Toonen complained that, because of Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code he was a victim of violations by Australia of Articles 17 (privacy), 2.1 (non discrimination) and 26 (equality before the law) of the ICCPR. Mr Toonen and the Federal Government made submissions to the Committee. The Federal Government's submission conveyed the views of the Tasmanian Government on Mr Toonen's complaint.

The Human Rights Committee, finding Australia in breach of Articles 17 and 2.1 of the ICCPR, determined that "an effective remedy" would be the repeal of the offending sections of the Tasmanian Criminal Code. The Committee asked the Federal Government to submit, within 90 days of the date on which the terms of the Committee's decision were transmitted to the Federal Government, information on the measures taken to give effect to the Committee's views.

The Human Rights Commissioner has decided to undertake an independent examination of the relevant sections of the Tasmanian Criminal Code and to exercise his powers under the Human Rights and Equal Opportunity Commission Act to formally report to the Attorney-General.

2 THE TASMANIAN LAWS

2.1 Tasmanian Criminal Code Act 1924

The relevant provisions of the Tasmanian *Criminal Code Act 1924* are contained in *Chapter XIV - Crimes Against Morality*. They are:

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 acts 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 persons.

The Tasmanian Government acknowledges' that there is no authority on the scope of the term 'sexual intercourse against the order of nature'. It appears clear, however, that the Section covers anal intercourse and it is possible that it may also extend to oral intercourse. Section 123 covers other sexual acts between males.

As set out above, the effect of these Sections is to criminalise some forms of sexual activity between males and females and all forms of sexual intercourse between males, including all forms of sexual intercourse and at least some expressions of sexual intimacy between consenting adult homosexual men in private.

The Tasmanian Government states that the most recent prosecution under these laws in respect of consenting homosexual activity between male adults was in 1984². The laws had, however, been applied in cases involving sexual activity with minors, non-consenting sexual activity and sexual activity in places to which the public have access. (The Tasmanian Government noted that these activities were independently prohibited under other laws, but acknowledged that charges may in the past have been laid in reliance on Sections 122 (a) and (c) and 123 of the Criminal Code).

¹ References to the views of the Tasmanian Government are, unless otherwise stated, references to those views as set out in the Federal Government's submission to the Human Rights Committee on the merits of Mr Toonen's case. A brief summary of the case and the views of the Human Rights Committee are in Appendix 1 to this report. The Human Rights Commissioner wrote to the Premier of Tasmania on 30 June 1994 advising him that he was preparing a report to the Federal Attorney-General on whether or not Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code were in compliance with Australia's international human rights obligations. The Human Rights Commissioner invited the Premier to let him know whether there were any views or comments which the Premier wished the Commissioner to consider "in addition to those I have seen which were conveyed on behalf of your Government by the Federal Government in its Submission to the Human Rights Committee on the merits of Mr Toonen's communication to that Committee". The Human Rights Commissioner advised the Premier he would be happy to come to Tasmania to discuss the matter with the Premier or the Tasmanian Attorney-General or with anyone the Tasmanian Government wished to nominate. At the time of completing this Report (i.e. 15 July 1994) the Human Rights Commissioner had not received any response from the Tasmanian Government.

² However, the Tasmanian Attorney-General recently stated publicly (ABC program, "AM", 8th July 1994) that a prosecution under Section 123 had been launched since the Tasmanian Government's views were conveyed to the Federal Government in the context of the Toonen case. The Commission understands that the charges relate to alleged sexual offences against minors between 1979 and 1982 and that, if the offences had taken place after 1987, it would have been possible to prosecute under other Sections of the Criminal Code.

2.2 Laws In Other States and Territories

Male homosexual acts between consenting adults in private were decriminalised in South Australia in 1972, in the ACT in 1976, in Victoria in 1980, in the Northern Territory in 1983, in New South Wales in 1984, in Western Australia in 1989 and in Queensland in 1990.

Discrimination on the grounds of homosexuality or sexuality is unlawful in New South Wales, Queensland, South Australia, the ACT and the Northern Territory. The Federal Government has also declared sexual preference to be a ground of discrimination for the purposes of the International Labour Organisation's Discrimination (Employment and Occupation) Convention 1958 and has provided a statutory mechanism by which complaints of discrimination in employment on the grounds of sexual preference can be considered by HREOC (see part 4 below).

3 HUMAN RIGHTS

3.1 Relevant HREOC Functions Concerning Human Rights

The Human Rights and Equal Opportunity Commission Act 1986 (section 11(1)) confers on the Commission a number of functions by reference to "human rights", including:

- (j) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the parliament, or action taken by the Commonwealth, on matters relating to human rights;
- (k) on its own initiative or when requested by the Minister, to report to the Minister as to the action (if any) that, in the opinion of the Commission, needs to be taken by Australia in order to comply with the provisions of the Covenant (i.e. ICCPR), of the Declarations or of any relevant international instrument.

3.2 Definition of Human Rights

Human rights are defined (HREOC Act s.3) for the purposes of the Act to mean the rights recognised:

in the ICCPR (signed by the Whitlam Government on 18 October 1972 and ratified by the Fraser Government on 13 August 1980); and

in certain Declarations adopted by the United Nations General Assembly or in other international instruments declared by the Attorney-General to be relevant (consideration of the provisions of which is not necessary for the purposes of this Report).

3.3 Applicability of the ICCPR in Australian States and Territories

Article 50 of the ICCPR stipulates that the Covenant "shall extend to the parts of Federal States without any limitation or exceptions". For the purposes of Australia, therefore, the provisions of the ICCPR apply to all States and Territories.

3.4 The Right to a Private Life (ICCPR Article 17)

Article 17 of the ICCPR states that:

"(1) no-one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks."

The right to privacy recognised in Article 17 of the ICCPR clearly includes a right to have a private life, including the right not to be penalised or arbitrarily subjected to detriment because of that private life.

Under the European Convention on Human Rights, which expressly recognises a right to 'private life', the European Court of Human Rights has held sexual orientation and consenting sexual behaviour in private to be aspects of private life.⁴ The Commission's considered view is that the same position obtains in this respect under Article 17 of the ICCPR.⁵ The Commission took a similar view in its report to the Federal Attorney-General on 25 September 1992 on Australian Defence Force Policy on Homosexuality.⁶ The Commission concluded, inter alia, that Australian Defence Force (ADF) policy on homosexuality (codified in 1986 in Defence Instruction 15-3) constituted an arbitrary interference with privacy and was therefore inconsistent with Australia's international treaty obligations under Article 17 of the ICCPR.

3.5 Arbitrary Interference

The right to privacy under ICCPR Article 17 is not recognised in absolute terms. Clearly, there are competing interests which in some cases may justifiably prevail over protection of privacy. The ICCPR provides for such cases by prohibiting only those interferences with privacy which are unlawful or "arbitrary".

The term "arbitrary" was considered during the drafting of the ICCPR as covering not only actions which were unlawful *per se* but also those which were unjust. In the drafting of Article 17, Australia (with several other countries) contended that the term "unreasonable" should be used.

³ Article 8.

⁴ See *Dudgeon v United Kingdom* (1981) 4 European Human Rights Reports 149; *Norris v Ireland* (1989) 13 European Human Rights Reports 186.

⁵ For a person's sexual preference to be protected by this aspect of the right to privacy, it is not necessary that this preference should be kept private in the sense of being kept secret. In the *Norris* case in the European Court of Human Rights, for example, Mr Norris was successful in his claim of unjustified infringement of his right to private life notwithstanding that he was publicly known to be homosexual in the context of extensive public campaigning for equal enjoyment of human rights for homosexuals.

This Report was tabled in Federal Parliament on 24 November 1992

However, the term "arbitrary" was retained on the basis that "arbitrariness" included actions which were unreasonable.⁷

Clearly, whether a particular restriction on privacy is reasonable, or to be regarded as arbitrary for the purposes of ICCPR Article 17, cannot be a matter of purely subjective judgment. The question must be resolved by examining whether the legislation, policy or action in question is a proportionate means to a legitimate end.⁸

3.6 Permissible Restrictions

Before assessing the arguments advanced by the Tasmanian Government to justify Sections 122 (a) and (c) and 123 of the Criminal Code, it is necessary to consider the general question of whether, and in what circumstances, restrictions on the rights recognised in the ICCPR are permissible. Article 5 of the ICCPR states:

"Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant."

This clearly establishes that the only permissible restrictions or limitations on rights recognised in the ICCPR are those recognised in the Covenant itself. According to widely accepted principles

⁷ Documentary references and a summary of these debates are given in M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights, 1987, I* at p.343.

⁸ These requirements are based on criteria which are internationally accepted in interpreting provisions in human rights instruments which permit limitations of rights where such limitations are "necessary" for specified reasons. See for example the decisions of the European Court of Human Rights in *Handyside v United Kingdom (1979) 1* European Human Rights Reports 737 and *Sunday Times v United Kingdom (1979) 2* European Human Rights Reports 245.

of interpreting and implementing the ICCPR, the burden of justifying a limitation upon a right guaranteed under the Covenant lies with the government concerned⁹.

Unlike several other Articles in the ICCPR, Article 17 does not expressly authorise restriction or limitation of the rights recognised in the Article. (The present issue, therefore, differs in this respect from one of those examined by the Commission in assessing whether or not the Federal Government's proposal in 1991 to ban political advertising in the electronic media was consistent with Australia's obligations under Article 19 of the ICCPR^o. Article 19.3" expressly allows restrictions on the rights recognised in that Article as long as they are "provided by law and are necessary." The Siracusa Principles indicate that a restriction required to be "necessary" must be based on an expressly permissible ground of restriction, pursue a legitimate aim, respond to a pressing public or social need, and be proportionate to the legitimate aim pursued.)

3.7 The Tasmanian Government's Case

The Tasmanian Government has contended that the laws are justified on public health and moral grounds.

^o The Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR, reported and discussed in the 1985 Human Rights Quarterly, were agreed in 1984 by a meeting of 31 experts in international law, including several members of UN supervisory bodies as well as academic experts. The Principles have no official authority of their own, but are widely accepted as reflecting the basic principles of interpretation to be applied to the relevant provisions of the Covenant.

¹⁰ See letter of 9 May 1991 from the Human Rights Commissioner to the Federal Attorney-General (included as Appendix 2 to this report).

Article 19 states "(1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for reasons of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals."

3.7.1 Public Health

The Tasmanian Government argues that retention of the laws are motivated, at least in part, by a concern to protect Tasmania from the spread of HIV/AIDS.

The Commission accepts that protecting the health of the people of Tasmania is clearly a legitimate objective. On the basis of the available evidence, however, the Commission does not believe that the laws are a reasonable or proportionate means of achieving that objective. Indeed, the Australian Government's National HIV/AIDS Strategy concludes that laws penalising homosexual activity impede public health programs promoting safe sex to prevent HIV transmissions, by driving underground many of the people at risk of infection, who will be deterred from presenting for testing, counselling, support and treatment. The Tasmanian laws therefore run directly counter to the nationally endorsed Strategy for fighting HIV/AIDS. (Our conclusion in respect of this issue is supported by the fact that, as recently as 15 April 1994, the Tasmanian Minister for Community and Health Services confirmed in writing to the Federal Minister for Health that the Tasmanian Government endorsed the National HIV/AIDS Strategy and was satisfied with the consultative process between the States and Territories in the development of the 1993-94 to 1995-96 Strategy.)

3.7.2 Moral Grounds

The Tasmanian Government advances several related arguments in contending that the laws are justified on moral grounds.

(a) They are necessary to uphold moral standards in Tasmania.

The Commission acknowledges that, although moral issues were not discussed during the drafting of Article 17, moral standards might in some circumstances be relevant to the reasonableness of an interference with privacy. But, in this case, the Commission does not consider the protection of morals a reasonable justification for the existence of the laws, nor does it consider that the extent of the interference with privacy is

proportionate to the moral aim alleged to be achieved. In taking this view the Commission notes that:

- Male homosexual acts between consenting adults in private are not prohibited in any other Australian jurisdiction;
- Discrimination on the ground of homosexuality or sexuality is unlawful in three of the six Australian States and in the ACT and the Northern Territory;
- The Australian Government has declared sexual preference to be a ground of discrimination for the purposes of the Discrimination (Employment and Occupation) Convention 1958 and has provided a statutory mechanism by which complaints of discrimination in employment on the grounds of sexual preference can be considered by HREOC;

Taken together these facts demonstrate that Australians generally accept that individuals should not be disadvantaged on the basis of sexual preference or orientation;

- The moral fabric of Tasmania is not more fragile than in other parts of Australia, nor does it require greater levels of protection.

(b) In support of the argument that the laws are justified on moral grounds, the Tasmanian government also argues that they (the laws) are maintained by a democratically elected government.

The Commission does not accept as cogent the argument that the laws are maintained by a democratically elected government. The Commission's task is to examine whether Australian laws (all of which are enacted by elected governments) are in conformity with Australia's international human rights obligations. Similarly, the

Commission does not accept the argument that, as the laws are validly enacted by democratic process, they cannot be an arbitrary interference with privacy.

- (c) The Tasmanian government further contends that matters of moral standards should be within the discretion of domestic authorities and a governmental "margin of appreciation" should, therefore, be afforded to the State party in relation to laws such as those under consideration.

The scope of the doctrine of "margin of appreciation" is not settled in international law". The European Commission of Human Rights and The European Court of Human Rights originally recognised the doctrine in the context of allowing a State to deal with public emergencies "by exceptional measures derogating from its normal obligations under the European Convention on Human Rights".¹² In another case the European Court acknowledged that States could take measures which derogated from their treaty obligations in order to combat emergencies, but determined that the European Commission and Court were empowered to rule on whether States had gone beyond "the extent strictly required by the exigencies" of the crisis.

The European Commission and Court have now extended the doctrine to cases where no emergency exists. Generally, the doctrine has been considered and applied where the article of the European Convention on Human Rights under consideration allows governments to restrict the rights provided for in the article in certain specific circumstances. Article 8, for example, allows States to impose restrictions or limitations on the exercise of the rights in that Article which:

"are necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention

¹² See generally Sieghart *"The International Law of Human Rights"*, 1984, pp87-103 and van Dijk and van Hoof *"Theory and Practice of the European Convention on Human Rights"*, 1990, pp583-606.

¹³ Greece v United Kingdom 176/56 Y B 2, 182.

¹⁴ Ireland v United Kingdom 5310/71 Judgment: 2 EHRR 25.

of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

Articles 9, 10 and 11 have similar clauses. In the Handyside case¹⁵ the European Court held it was "for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context" and that, consequently, a "margin of appreciation" must be left to the States in that respect. But the "margin of appreciation" was not unlimited. It was for the Court, not the State, to make the final determination on whether the restriction was compatible with the Convention. In the Lingens Case the European Court decided the Court must determine whether the interference at issue (ie the proposed restriction on the right provided for in the Convention) was "proportionate to the legitimate aim pursued" and whether "the reasons adduced to justify it are relevant and sufficient". This case made it quite clear that, as far as the European Commission and Court were concerned, the scope of the governmental "margin of appreciation" would depend to a large extent on the particular characteristics of each case.

In practice, the European Commission and Court have allowed governments a wide "margin of appreciation" to promote public order, to combat terrorism and in the interests of economic development. The Commission and Court have been less willing to apply the doctrine in cases involving freedom of expression and the right to privacy. In the Dudgeon case, in which the complaint was directed at the existence in Northern Ireland of laws which had the effect of making certain sexual acts between consenting adult males criminal offences, the Court held that "...the present case concerns a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interference on the part of public authorities can be legitimate for the

¹⁵ See footnote 8.

¹⁶ See the Silver et al v. United Kingdom, Judgment of 25 March 1983, AC.61 (1983) pp.37-38

Judgment of 8 July 1986, A103, pp. 25-26

¹⁸ See footnote 4.

purpose of paragraph 2 of Article 8" (Article 8 refers to the right to a private life). The European Commission and Court have not developed a consistent approach where governments have argued for a "margin of appreciation" to protect morals. The Norris case confirmed that it was for the Court to assess whether the restrictions imposed in the interests of "the protection of morals" was in keeping with rights provided for in the Convention. In the Handyside case" the Court spoke of allowing some latitude to governments on moral matters because there is no "uniform European conception of morals".

Reviewing the inconsistencies of the European case law, some commentators' have suggested that, when in doubt, the Commission and Court have generally considered the "margin of appreciation" in terms of assessing whether the State's proposed restriction on the right provided for in the Convention was proportionate to the legitimate aim pursued and whether it was reasonable in the circumstances.

After careful consideration the Commission does not accept the applicability of the "margin of appreciation" argument in the terms advanced by the Tasmanian Government. As already stated, the Commission does not consider that protection of morals is a reasonable justification for the existence of the laws, nor does it consider that the extent of the interference in privacy is proportionate to the moral aims alleged to be achieved. The provisions of Article 17 of ICCPR are clear. Even where the European Convention on Human Rights expressly permits a restriction for the protection of morals, the European Commission and Court have been extremely reluctant to allow interferences by States in the private lives of their citizens.

- (d) Article 17 of the ICCPR makes no express provision for restriction of the right to privacy on moral grounds, unlike other Articles of the Covenant - for example those

¹⁹ See footnote 5.

" See footnote 8.

²¹ e.g. van Dijk and van Hoof *"Theory and Practice of the European Convention on Human Rights"*. 1990

providing for freedom of thought, conscience and religion (Article 18), freedom of expression (Article 19), the right to peaceful assembly (Article 21) and freedom of association (Article 22). The Tasmanian Government maintains that the absence of a specific limitation provision in Article 17 indicates that moral issues are intended to be a matter for domestic decision. If moral controls are permissible in respect of religion, freedom of movement and freedom of association, they must also be permissible in respect of sexual practices.

As already indicated, the only permissible restrictions or limitations on the rights recognised in the ICCPR are those recognised in the Covenant itself. Article 17 does not expressly allow restrictions or limitations on the right to privacy. Insofar as the Tasmanian Government is arguing that it should have a wide discretion on moral matters, the Commission's position is stated under (c) above.

- (e) The laws are applied in cases involving sexual activity with minors, non-consenting sexual activity and sexual activity in places to which the public have access.

The Commission notes that these activities are also prohibited by other laws but that, apparently for technical reasons, charges have been laid on the basis of Sections 122 (a) and (c) and 123 rather than on the basis of the other laws. The Commission considers that the existence of the other laws make it unnecessary to maintain Sections 122 (a) and (c) and 123 of the Criminal Code.

- (f) Moral and religious values vary from country to country. Other States which are parties to the Covenant might well have similar laws to those in the Tasmanian Criminal Code - for example Islamic countries.

The Commission's responsibility is to interpret the rights recognised in the ICCPR "as that Covenant applies to Australia" (HREOC Act section 3.4). As stated above, the Commission considers that sexual orientation and consenting sexual acts in private are covered by the right to privacy protected by the ICCPR. This view is generally shared by the European Court of Human Rights. The fact that several States parties to the

ICCPR may have laws imposing restrictions on homosexual activity between consenting male adults would not, in itself, establish that those States consider such restrictions justified under the ICCPR. (It is possible, in framing the relevant legislation, that the ICCPR was not adverted to). In any case, it is quite clear that Australia is bound by international law to fulfil its obligations under the ICCPR, irrespective of whether several other States dishonour their obligations.

In summary, the Commission does not consider that the extent of the interference with personal privacy caused by the Tasmanian laws is a proportionate response to the perceived threat to the moral standards of Tasmania. The fact that the laws have generally not been enforced clearly suggests that they are not necessary for the protection of Tasmania's moral standards..

3.8 The Prohibition of Discrimination (ICCPR Article 2.1)

The conclusion that Sections 122 (a) and (c) and 123 constitute arbitrary interference with the privacy of individuals is reinforced by reference to the discriminatory nature of the laws.

One of the most fundamental provisions of the ICCPR²² requires the rights recognised therein to be respected and **ensured** to all individuals within Australian jurisdiction:

"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."

In the drafting of the ICCPR, this clause was regarded as an all-inclusive provision which would apply to discrimination on any grounds, rather than the grounds of discrimination being limited to those actually listed (as the wording "...such as..." and "...or other status..." clearly indicates') In the Commission's view, therefore, this provision applies to discrimination on the grounds of sexual preference or sexual orientation affecting rights recognised in the ICCPR - including the right to privacy.

²² Article 2.1

²³ See M. Bossuyt, *op.cit.*, page 486 for summary of debate and documentary references.

It is also pertinent in this context that it is now well established that the undertaking by States parties to "ensure" the rights set out clearly connotes a positive obligation to actively protect the rights provided for by the Covenant (in addition to the more passive undertaking to "respect" them.)

The Commission also notes in this context that the Tasmanian Government accepts that homosexuality is covered by the term "other status" for the purposes of the ICCPR.

3.9 Equality Before the Law and Equal Protection of the Law (ICCPR Article 26)

Article 26 of the ICCPR stipulates that:

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.

As with ICCPR Article 2.1, the grounds of discrimination enumerated in the second sentence of this provision clearly do not constitute an exhaustive list Sexual preference is therefore not excluded simply because it is not specifically listed. Moreover, the first sentence of Article 26 recognises the right to equality before the law and requires equal protection of the law for "**all** persons" [emphasis added], "without **any** discrimination" [emphasis added].

The United Nations Human Rights Committee (which monitors compliance with the ICCPR through consideration of periodic reports by States Parties, including Australia) has indicated' that discrimination for the purposes of this provision encompasses any distinction which nullifies or impairs the recognition, enjoyment or exercise on an equal footing of human rights and freedoms, and which is not a reasonable and objective means to achieve a legitimate purpose.

²⁴ General comment 18 (37): Report of the Human Rights Committee (1990), **U.N. Doc. A145140, Vol 1, p.173**

The Tasmanian Government maintains "that Section 122 of the Criminal Code is not discriminatory because it applies equally to heterosexuals and homosexuals" ²⁵ It also argues that the laws do not discriminate between classes of citizens but rather identify acts which are unacceptable to the Tasmanian community and that, as noted above, the laws can be justified on public health and moral grounds.

The Commission does not accept these arguments. Sections 122 (a) & (c) and 123 criminalise all forms of consenting, homosexual sexual intercourse and some expressions of sexual intimacy between adult males in private, but not all forms of consenting heterosexual sexual activity between adult males and females in private nor consenting homosexual sexual activity between adult females in private. These Sections therefore mean that those individuals who engage in certain sexual activities are unequal before the law and unable to claim equal protection of the law. Although the legislation specifically targets acts, the impact of the relevant provisions is to distinguish an identifiable class of individuals and to prohibit certain acts by those individuals. These laws are clearly understood by the community as being directed at male homosexuals.

The fact that the laws in question are not currently being enforced does not mean that homosexual men in Tasmania have effective equality under the law. Equal protection of the law (as referred to in Article 26 of the ICCPR) clearly refers to the substance of the law as well as to its application. Male homosexuals, unlike others in Tasmania, must either not engage in sexual activity or live their sexual lives in the knowledge that they are committing criminal offences and that the stigma which the community generally associates with engaging in "criminal activities" attaches to them.

For these reasons the Commission considers that Sections 122 (a) and (c) and 123 are not consistent with the recognition, enjoyment and exercise of human rights in the terms prescribed in Article 26.

²⁵ See footnote 1.

4 EQUAL OPPORTUNITY AND TREATMENT IN EMPLOYMENT AND OCCUPATION

4.1 HREOC Functions Regarding Equal Opportunity in Employment and Occupation

Section 31 of the Human Rights and Equal Opportunity Commission Act confers on the Commission a number of functions, including:

- (e) on its own initiative or when requested by the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to equality of opportunity and treatment in employment and occupation.*

4.2 Meaning of Equality of Opportunity and Treatment in Employment and Occupation

'Equality of opportunity and treatment in employment and occupation' is not expressly defined by the HREOC Act. However, this provision, together with the other provisions of Part III of the Act, clearly operate by reference to the definition of "discrimination" contained in section 3 of the Act, and to the Discrimination (Employment and Occupation) Convention 1958 on which that definition is based.

The grounds included within the definition of the HREOC Act as originally enacted include "sex" but do not include sexual preference. The Act, however, provides for additional grounds of discrimination to be specified. On 21 December 1989 the Governor-General proclaimed the Human Rights and Equal Opportunity Commission Regulations (effective from 1 January 1990) which declared an additional twelve grounds of discrimination for the purposes of the HREOC Act, including the ground of "sexual preference".

It is not suggested that Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code directly contravene Australia's obligations under the Discrimination (Employment and Occupation) Convention 1958. The Commission believes, however, based on its experience in administering anti-discrimination legislation, that these sections help to create a climate in Tasmania in which the

risks of discrimination in employment and occupation on the ground of sexual preference are increased.

5 CONCLUSIONS

Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code are inconsistent with several specific rights which Australia has undertaken to protect by its ratification of the ICCPR.

- The right to Privacy (Article 17)
- The right to non-discrimination in the exercise of the right to privacy (Article 2.1)
- The right to equality before the law and equal protection of the law (Article 26)

These provisions of the Tasmanian legislation are therefore clearly inconsistent with Australia's international treaty obligations on human rights.

6 RECOMMENDATION

Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code should be immediately repealed by the Tasmanian Government. If the Tasmanian Government will not take this action then the relevant provisions of Tasmanian legislation must be overridden by appropriate Federal legislation.

APPENDIX 1

MR TOONEN'S CASE TO THE HUMAN RIGHTS COMMITTEE

Australia acceded (i.e. became a party) to the First Optional Protocol to the ICCPR on 25 September 1991. The accession became effective on 25 December 1991. This enables individuals in Australia to complain to the United Nations Human Rights Committee (established under the ICCPR) concerning violations of the rights recognised by the ICCPR. There are 148 countries which are parties to the ICCPR and 78 are parties to the First Optional Protocol.

On 25 December 1991 Mr Toonen submitted a complaint (technically referred to as a "communication" under the Rules of Procedure of the Human Rights Committee) to the Human Rights Committee that, because of sections of the Tasmanian Criminal Code (Sections 122 (a) and (c) and 123) he was a victim of violations by Australia of Articles 2.1 (non-discrimination) 17 (privacy) and 26 (equality before the law) of the ICCPR.

On 5 November 1992 the Human Rights Committee determined that Mr Toonen's complaint was "admissible" in accordance with the Rules of Procedure (87-92) of the Human Rights Committee. The Committee accepted that there were no administrative, judicial or legislative remedies available to Mr Toonen in Australia.

In accordance with the Committee's Rules of Procedure, Mr Toonen and the Federal Government made written submissions to the Human Rights Committee. The Federal Government's submission conveyed the views of the Tasmanian Government on Mr Toonen's complaint.

THE DECISION/VIEWS OF THE HUMAN RIGHTS COMMITTEE

On 31 March 1994 the Committee published its views on the case'. In summary these views were:

- Australia is in Breach of Article 17 of the ICCPR
- Australia is in Breach of Article 2.1 of the ICCPR in Conjunction with Article 17
- An effective remedy would be the repeal of Sections 122 (a) and (c) and 123 of the Tasmanian Criminal Code
- It is not necessary to consider whether there has also been a violation of Article 26 of the ICCPR

²⁶ The Committee had earlier made a separate determination as to the "admissibility" of the case. (Reports of the Human Rights Committee CCPR/C/50/48811992).

*Human Rights and
Equal Opportunity Commission* ¹⁷²¹

Human Rights Commissioner

9 May 1991
Our ref: DM 91/092

The Hon. Michael Duffy MP
Attorney-General
Parliament House
Canberra A.C.T. 2600

CC: Senator Hon. Nick Bolkus
Minister for Administrative
Services
Parliament House
Canberra A.C.T. 2600

Dear Attorney

By letter on 20 March I indicated to your colleague the Minister for Administrative Services that I had serious concerns regarding the consistency of the Government's proposal to ban political advertising in the electronic media with Australia's international treaty obligations. In particular, I was concerned with obligations flowing from our ratification of the International Covenant on Civil and Political Rights (ICCPR), which is incorporated in Federal legislation in the Human Rights and Equal Opportunity Commission Act 1986 (HREOC Act) and by reference to which this Commission has a number of functions.

My letter and a short statement which I sent to your office also indicated that I would, on receipt of details from the Government of the decision taken by Cabinet, consider what, if any, further action should be taken or avoided to ensure that Australia complies with its obligations at international law and advise the Government accordingly.

Senator Bolkus wrote to me on 26 March in terms which, while promising co-operation, indicated that no information beyond his press release of 19 March would be available to me at that point. No further information has been provided to me on a formal basis, although I am aware of a number of statements by Senator Bolkus in response to questions in Parliament.

Section 14 of the HREOC Act states that, for purposes of the performance of its functions, "the Commission may make an examination or hold an inquiry in such manner as it thinks fit".

Having carefully considered the information available, I am satisfied that a complete ban on political advertising on radio and television as proposed would clearly constitute a breach of our obligations under the ICCPR. I thought it would be more useful to the Government (given your responsibilities with respect to legislation) to advise you accordingly at this point, rather than awaiting the development of legislation along lines impermissible under the Covenant.

1. STANDING COMMITTEE REPORT

While I am not obliged, as a matter of law, to consider the deliberations of Parliamentary Committees I believe the importance of this issue, the limited amount of information available to me, the fact that the Parliament is still seized of the issue, and the terms of the legislation just referred to, make this appropriate in this instance. I have also adopted this course because the Minister for Administrative Services has referred (Hansard, Senate, 10 April 1991, p.2198) to the report of the Joint Standing Committee on Electoral Matters, "Who pays the piper calls the tune: minimising the risks of funding political campaigns" (Report no.4, June 1989) as supporting the proposed ban.

However, the Report of the Standing Committee, in my respectful opinion, is unsatisfactory as a basis for the restrictions apparently recommended therein and, a fortiori, for the more restrictive ban now proposed - even if regard is had only to the majority Report and not to the dissenting reports issued.

I say "apparently recommended" since the list of recommendations preceding the body of the Report contains no reference to paid political advertising. Despite this, the following passage (ostensibly a recommendation) appears at paragraph 10.4:

Free time for political advertising should apply for both Federal and State elections subject to the following conditions:

1. there be no paid political advertising on radio or television from the date of the Issue of the Writs to polling day; and

Z. all registered political parties or candidates accepting free time on radio or television submit to the AEC a return which discloses all donations, incomes and expenditures, irrespective of the purposes for which they were received or made. (The requirement for this disclosure is contained in Recommendation 3.)

The restriction proposed in paragraph 1. is expressed as being a condition of free time for political advertising. However, it appears that the Committee contemplated a ban on paid political advertising by any party or person irrespective of whether they accept such free time.

This recommendation is clearly less restrictive than the proposal adopted by Cabinet since it applies only for a defined period. It would, nonetheless, face many of the same problems of justification as the more sweeping proposal.

The majority report discusses the concept of a complete ban on political advertising in the following terms:

9.8 While some viewers may support a complete ban on political advertising it would have a direct effect on freedom of speech by reducing opportunities for discussion during election periods when voters are determining the candidate or party they wish to support.

9.9 Most witnesses disagreed with a complete ban on political advertising, claiming that it would have an adverse effect on freedom of speech and in particular would disadvantage citizens and groups who wished to bring issues before the electorate. The beneficiaries of a complete ban would be the existing major parties.

It should be noted first that the Standing Committee Report clearly endorses the view that a ban on political advertising "would have a direct effect on freedom of speech".

Second, paragraph 9.8 refers to a complete ban reducing opportunities for discussion "during election periods". Obviously the effects of the much more extensive ban now proposed would be wider than this, and would raise concerns in relation to freedom of speech more broadly than the ban which was condemned (although apparently also proposed) by the Standing Committee majority report.

I believe it is therefore clear that the Standing Committee Report cannot be construed as a satisfactory basis for the proposed ban.

1.1 FREE TIME

I note that, whereas the Standing Committee recommendations include expansion of free time entitlements, the Minister for Administrative Services has indicated that the ban presently proposed "will include a ban on paid and unpaid political advertising and free time currently provided by the ABC" (Hansard, Senate, 11 April 1991, p. 2309).

1.2 OVERSEAS EXPERIENCE

The Report reviews the position in a number of jurisdictions in relation to political advertising. It summarises this review in a table which indicates that paid political advertising is permitted in:

Australia, Canada, Federal Republic of Germany, New Zealand and the U.S.A;

and is not permitted in:

Austria, Belgium, Denmark, Finland, France, Ireland, Israel, Italy, Japan, Netherlands, Norway, Sweden, Switzerland, and the U.K.

Study of the text of the Report, however, indicates that, even if the Report can be relied on for accurate information (and in some respects it cannot), this table is misleading. The information provided in the text of the Report is also misleading and/or incomplete in important respects.

Several of the countries identified as prohibiting "political advertising" are in fact stated to prohibit only party political advertising, within a defined period of an election. Moreover, and in my view equally importantly, our research indicates that of those States which prohibit paid political advertising, all but one - Norway - permit

some form of political advertising in the electronic media.

The only State referred to which prohibits all political advertising in the electronic media (that is, Norway) in fact permits no advertising whatsoever on its exclusively State-owned media. The identification of Israel as not permitting political advertising appears, similarly, to be of dubious relevance - since the sole broadcaster is noted by the Report to be state owned. Moreover, the prohibition identified, under the Election Law (Propaganda) Act 1959, s.15(a), relates only to elections.

In my considered view, it is clear that for a State which does not permit any electronic media advertising to fail to make an exception in relation to political advertising does not raise the same issues as the case of a State prohibiting access for certain purposes to media owned and operated by others and which do engage in paid advertising in other fields.

The Report's discussion of New Zealand commences by stating that "New Zealand has followed the United Kingdom in adopting restrictions on its broadcast media". It is clear, however, that for relevant purposes this is not accurate. (Indeed, the Report itself acknowledges that New Zealand permits paid political advertising in the electronic media and the United Kingdom does not.)

To the extent, therefore, that Cabinet or the Minister relied on information provided by this Report concerning members of the community of nations which some may consider comparable to Australia (the so called "Western democracies") it would appear that the Government may have been materially misled.

2. RELEVANCE OF OVERSEAS PRACTICE

This Commission's responsibility is to interpret the rights recognised in the ICCPR "as that Covenant applies in relation to Australia" (HREOC Act s.3). This includes interpreting the Covenant in accordance with accepted rules of international law.

The 'accepted principles of interpretation of treaties at international law, reflected in the Vienna Convention on the Law of Treaties (Article 31), require that the terms of a treaty are to be interpreted in good faith and in accordance with their ordinary meaning. (The High Court has confirmed that the Vienna Convention should be referred to for applicable principles of interpretation of treaties: Commonwealth v. Tasmania (1983) 158 Commonwealth Law Reports 1 at 93, per Gibbs CJ; at 177, per Murphy J; at 222-223, per Brennan J.)

Other means of interpretation, including State practice - to the extent that this is relevant - are secondary.

Subsequent conduct by States Parties in the application of the treaty may be taken into account in interpreting the nature of the obligations, although it remains a factor of only secondary importance. In any event, if that practice is inconsistent with the ordinary meaning of the relevant provisions, it cannot be taken as modifying the nature of the obligations. It cannot be countenanced that parties to human rights

treaties are free by subsequent conduct - other than the procedures for denunciation provided for or by unanimous agreement - to defeat basic obligations thereunder. This would be contrary to the fundamental principle of good faith, and contrary to the rule that a treaty be interpreted according to its object and purpose.

Moreover, the fact that several States Parties to the ICCPR may have legislation imposing restrictions on political advertising would not, in itself, establish that those States consider such restrictions justified under the ICCPR. It is equally possible that in framing the relevant legislation the ICCPR was simply not adverted to. (This would be consistent with a great deal of evidence, including in Australia, that once these basic human rights treaties are ratified they are often remembered only in Departments of Foreign Affairs or Departments of the Attorney-General, or in smaller sub-divisions of government having specific responsibility for human rights matters which may not always be consulted prior to formulation of proposals affecting human rights.)

In any case, the practice of banning political advertising is plainly not universal or sufficiently widespread to evidence a general agreement on interpretation among States Parties to the ICCPR - even if those countries which have introduced and maintained such a ban can properly be considered to have done so in reliance on a particular view of Article 19 of the ICCPR.

The only case of which I am aware concerning comparable restrictions on the media being explicitly defended as consistent with a human rights treaty is that of the United Kingdom Government in X and the Association of Z v. United Kingdom [App. no. 4515/70, 12 July 1971]. In that case the European Commission on Human Rights held (in a decision giving only the most cursory consideration to the fundamental human rights issues involved) that a ban on paid political advertising was permissible under the European Convention on Human Rights.

I believe the government's advisers may have considered this decision in preparing the submission on which the Cabinet reached its recent decision. However, in my considered view, that decision does not dispose of the issue under the ICCPR - for the following reasons.

The European Commission's determination was based on a provision of the European Convention expressly indicating that licensing of television and radio remained permissible. The International Covenant on Civil and Political Rights omits any such provision, precisely (as indicated by the travaux preparatoires) because of concern during drafting that such a provision might be interpreted to permit excessive limitations on free expression through these media. (Licensing requirements, particularly for technical purposes, were contemplated as permissible under the provision of Article 19, which permits limitations necessary for "public order", but only on the basis that these requirements are consistent with the right itself.)

Moreover, the most recent relevant decision of the European Court of Human Rights (the decisions of which carry greater authority than the determinations of the European Commission) indicates that the adequacy of the European Commission's

1971 view, even as an interpretation of the European Convention, is open to serious doubt. (This decision occurred only last year and I believe advice to the Minister or the Cabinet may not have taken it into account.)

In Groppera Radio A.G. v. Switzerland [(1990) 12 European Human Rights Reports 321 at 339] the Court emphasised that the European Convention did not permit any licensing restrictions whatsoever, but only those consistent with the object and purpose of Article 10 (the Article recognising freedom of expression) as a whole. The discussion by the European Commission in its 1971 decision, by contrast, fails to discuss this principle adequately or indeed at all, and appears to treat the provision permitting licensing as permitting any restriction whatsoever on relevant media.

It is clear, therefore, that the decision of the European Commission in X and the Association of Z v. United Kingdom cannot be taken as representing the position under the ICCPR.

The European Commission in its 1971 decision adverted to practice in European States, including the fact that many permitted no advertising whatever on radio or television, in determining the width of the provision of the European Convention permitting licensing. To the extent that such practice is relevant, it should be noted that in June 1990, in Copenhagen, the governments participating in the Conference on Security and Co-operation in Europe agreed to ensure:

that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process.

Notwithstanding suggestions to the contrary therefore, it appears clear that the trend of overseas practice is in the opposite direction to that indicated by the proposed ban.

Beyond these considerations, however, Australia is bound by international law to fulfil its obligations under the ICCPR, irrespective of how consistently other States honour theirs.

3. FREEDOM OF EXPRESSION AND INFORMATION

I turn now, therefore, to those treaty obligations. While a concluded view cannot be expressed on all aspects of possible variations of the proposed ban on political advertising, it is possible to state that:

a complete ban on all political advertising on radio and television as proposed would be an interference with the rights to freedom of expression and information recognised in ICCPR Article 19.2, would exceed the permissible limitations under ICCPR Article 19.3, and accordingly would be contrary to the human rights recognised in the ICCPR;

a ban as proposed would for some purposes also be inconsistent with the political rights recognised in ICCPR Article 25.

3.1. ARE THESE RIGHTS AFFECTED?

ICCPR Article 19.2 provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice [emphasis added].

This right would clearly be restricted by a ban on the advertising of a particular category of ideas and information - i.e. "political" advertising. (Difficulties in defining what is "political" and the consequences of these difficulties are considered below).

The rights of two classes of individuals are affected: (1) the rights of those wishing to impart such information and ideas and (2) the rights of those wishing to receive them. It is particularly important from a human rights standpoint to emphasise that while most of the opposition expressed to the proposed ban has come from persons and organisations within the first of these categories, the most serious effect of this ban relates to its impact on the accessibility of information for blind and other sight impaired Australians (who presently number 110,000) and the more than one million Australians who are functionally illiterate. (As discussed in more detail below, discriminatory impact is one reason for finding restrictions on rights impermissible under the ICCPR.)

Restriction of the rights recognised in Article 19.2 would arise from the proposed ban notwithstanding that advertising remains available through other media, since as emphasised above, Article 19.2 specifies that freedom of expression includes freedom for everyone to receive or impart ideas "through any ... media of his [sic]. choice".

The statement issued by the Minister for Administrative Services on 19 March announcing the Government's decision appears to assert that no issue of freedom of expression is raised since this freedom is already restricted by the expense involved in advertising in the electronic media. The Minister has subsequently re-stated this proposition, albeit in more colloquial terms; thus "what we are talking about in terms of banning political advertising is not free speech; we are talking of bought speech" and "it is not free speech; it is bought speech" (Hansard, Senate, 11 April 1991, p. 2315). While I understand the point the Minister is making it is not, with respect, one that goes to the substance of our treaty obligations. It is basically a play on words addressing a different issue (which I deal with below).

First, even with respect to this issue, available information indicates that advertising, on non-metropolitan radio at least, is within the means of, and a major medium of communication for, a range of groups with limited resources.

Second, and more fundamentally, the fact that the exercise of a right in practice is already limited to some extent (particularly by non-government actors or by economic considerations) cannot mean that all further restrictions, particularly those imposed by Government, are permissible. This is the case whether the practical restrictions

existing are or are not themselves consistent with the right. (A more dramatic illustration of this point would be that the right to life recognised in Article 6 of the ICCPR remains binding on governments notwithstanding limitations on enjoyment of this right in many countries through disease, starvation, the activities of death squads etc. Indeed, rather than relieving governments of their obligations, these factors underline the duty of government to take measures to promote and protect the right in question.)

The U.N. Human Rights Committee (which is the international body responsible for monitoring observance of the ICCPR) has pronounced on the effect of practical factors such as control of mass media on the enjoyment of freedom of expression as follows:

Not all States parties have provided information concerning all aspects of the freedom of expression. For instance, little attention has so far been given to the fact that, because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3. [General Comments adopted by the Human Rights Committee under ICCPR Article 40(4), General Comment no.10: Article 19, U.N.Doc.CCPR/C/21/Rev.1, p.9.]

This concern, however, would be validly and properly addressed by appropriately extending access to the electronic media to those not enjoying it, rather than denying such access (and accordingly also denying the right to freedom of expression) to all parties.

However, as already noted, the Minister for Administrative Services has indicated that rather than free time entitlements being expanded, these are to be further restricted, with allocation of free time by the Australian Broadcasting Corporation being limited to party political launches.

In any case, the allocation of free time to political parties (conditional on their qualifying by reference to a level of popular support), even on an expanded basis, would not guarantee that a ban on paid advertising on radio and television did not restrict freedom of expression in violation of the ICCPR. This is so for several reasons:

(a) Such allocation does not address the rights of individuals in, or on behalf of, parties below this qualifying level of support to express their ideas or convey information (and the corresponding rights of others to receive these ideas and information).

(b) The proposed ban is not restricted to political parties but will apply to any advertising of a "political" nature. On the information available to me it does not appear to be contemplated that any person or organisation refused or liable to be refused permission to advertise on this basis will instead be granted free time (and it is difficult to see how this could occur).

(c) The proposed ban is to apply not only in a defined period prior to an

election, but at all times. It does not appear to be contemplated that free time will similarly be available at all times, rather than only in the context of election campaigns. Whatever limitations on timing of advertisements may be permissible, in my considered view there is no basis for any view that freedom of expression as recognised in ICCPR Article 19 means, so far as the expression of political ideas and information in the electronic media is concerned, freedom of expression only for political parties and only once every three or four years.

Third, the principle advocated by the Minister for Administrative Services would, if seriously pursued, justify not only a prohibition of paid political advertising in any media, but a ban on many of the means of effective expression of political ideas in modern Australian society.

Clearly, the view that "bought speech" cannot be "free speech" would authorise a ban not only on political advertising on radio and television, but also political advertising in print media. Further, I can find no cogent reason why this would not apply equally to publications produced and distributed by political parties or other organisations, or by individuals, on their own behalf, since these are also forms of "bought speech".

The Minister's proposed principle would also authorise a ban not only on advertising but on other commercial forms of political pronouncements, including political comment or reporting by commercial television or radio or newspapers, since these means of expression also constitute "bought" speech.

Political posters also generally cost money to produce and would similarly constitute "bought speech". Further, political meetings of any significant size also require financial resources, (for matters such as hire of a venue and public address systems).

In summary, it is difficult to conceive what speech, other than the unaided human voice, might not be categorised as "bought speech".

I have thought it may be helpful to allude to the foregoing examples not to suggest that the Government or the Minister for Administrative Services has any intention to ban these further categories of political speech, but to demonstrate that the distinction between "free speech" and "bought speech" is neither sustainable nor helpful in the context of ascertaining our international legal obligations.

3.2 PERMISSIBLE RESTRICTIONS

Since I have concluded that the proposed ban clearly restricts the rights recognised in ICCPR Article 19.2 (contrary to the view advanced by the Minister for Administrative Services), the issue is whether this restriction falls within one of the permissible exceptions.

Article 19.3 stipulates that some restrictions are permissible, but in my view this derogation only extends to those Founds which are expressly *referred to*.

I have reached this conclusion having regard to our other treaty obligations and, in particular, to the provisions of Article 5 of the ICCPR, which state:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant [emphasis added].

This clearly establishes that the only permissible limitations on rights recognised in the ICCPR are those recognised in the Covenant itself.

Article 19.3, then, specifies that:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals.

It is therefore indisputable that to be permissible under Article 19.3 (and accordingly to be permissible under the Covenant) a restriction must be:

provided by law; and
necessary; and

such that the necessity be demonstrated by reference to one of the categories of restriction provided.

3.2.1 Provided by law

- i) The proposed ban could only be implemented in the Australian context by legislative means. This would satisfy one element of this criterion. However (as indicated by the "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" and associated commentary) there are a number of other requirements.¹

A law imposing a restriction must be accessible and reasonably ascertainable in its effect [see e.g. Sunday Times v. U.K., (1979) 2 European Human Rights Reports 245 at 271, interpreting the equivalent requirement that restrictions be "provided by law" under the European Convention on Human Rights]. No

¹These principles, reported and discussed in (1985) 7 Human Rights Quarterly, were agreed in 1984 by a meeting of 31 experts in international law, including several members of I.J.N. supervisory bodies as well as academic experts. The 'Principles' have no official authority of their own, but are widely accepted as reflecting the basic principles of interpretation to be applied to the relevant provisions of the Covenant.

problem as to accessibility appears. As to ascertainability, however, considerable difficulty could arise in determining what advertising is "political" and therefore proscribed.

There has been some suggestion that the Australian Broadcasting Tribunal and/or the Australian Electoral Commission would bear responsibility for this determination. Such a mechanism, if itself provided by law and subject to appropriate review, might render the restriction sufficiently ascertainable for this purpose - but only if the administrative body responsible for such determinations is itself required to make determinations on sufficiently ascertainable criteria.

- iii) The law must be consistent with other requirements of the Covenant. This interpretive principle restates the effect of Article 5.1, noted above.

3.2.2 Relevant grounds of restriction

3.2.2(a) Rights and reputations of others

There has been no suggestion, nor is there evidence to suggest, that a restriction on political advertising similar to the proposed ban is necessary to protect the reputation of any person.

It might be argued that the proposed ban, being intended to protect the integrity of the political process, and to prevent distortion of that process by disproportionate resources being available for advertising, is directed to protecting the individual political rights recognised in ICCPR Article 25, including the right "to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors" [emphasis added].

While less sweeping restrictions - such as limitations on campaign spending - might be supported on this basis, such an argument for the proposed ban on all political advertising in the electronic media must effectively address two sets of objections:

First, as discussed below, restrictions must be only such as are "necessary" for the purpose to be pursued. No evidence appears why less restrictive means cannot be used to address any need which may exist.

Second, a complete ban on political advertising in these media may, in itself, interfere with the rights recognised in Article 25 for some persons, as discussed below.

3.2.2(b) National security; public health

No suggestion has been made, nor does any evidence appear, to connect the proposed

ban to "national security" or to "public health".

3.2.2(c) Public morals; public order (ordre public)

The statement issued by the Minister on 19 March indicates that the purpose of the proposed ban is to prevent corruption in the political process, by means of reducing the pressure on political parties to raise increased amounts of funds.

Existing case law dealing with "public morals" has broadly addressed community morality rather than the morality of public officials. This heading could, however, arguably include measures against official corruption.

However, the heading "public order (ordre public)" is potentially of more relevance. This heading is clearly wider than the concept of "public order" in the sense usually understood in Anglo-Australian law (dealing with prevention of breaches of the peace, offensive behaviour etc). It extends to "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded" (Siracusa Principles, Principle 22; and see A. Kiss, "Permissible Limitations on Rights" in Henkin (ed.) The International Bill of Rights, 1981). It equates with the "police power" in United States jurisprudence, permitting regulation in the interests of legitimate public purposes. This power must itself, however, be exercised in a manner consistent with human rights (see Lockwood, Finn and Lubinsk`y, "Working Paper on Limitation Provisions", (1985) 7 Human Rights Quarterly 35, at 59).

Although there is no clear case law on the issue, there is little difficulty in relating the purpose of preventing political corruption to the heading "public order (ordre public)". Plainly, the political process is central to public order.

The issue, therefore, is not whether the proposed ban is related to a permissible purpose, but whether it is a permissible means of achieving that purpose.

3.2.3 Is the restriction necessary?

It is clear that a Party to the Covenant, limiting the right to freedom of expression and claiming that the limitation is necessary on one of the permissible grounds, must evidence, rather than simply assert, that necessity: Pietroroia v. Urueuay (Views Adopted by the Human Rights Committee, U.N. Doc A/36/40 p.150).²

The "Siracusa Principles"³ indicate that a limitation required to be necessary must:

² This is reflected in Principle 12 of the "Siracusa Principles", which states that "the burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State.

³ Principle 10

- (a) be based on a permissible ground of limitation;
- (b) pursue a legitimate aim;
- (c) respond to a pressing public or social need; and
- (d) be proportionate to the legitimate aim pursued.

These principles reflect those which have been applied by the European Court of Human Rights (in interpreting the comparable limitation provision regarding freedom of expression in the European Convention) in a number of relatively recent cases: see for example Handyside v U.K. (1979) 1 European Human Rights Reports 737; Sunday Times v. U.K. (1979) 2 European Human Rights Reports 245; Barthold v. Germany (1985) 7 European Human Rights Reports 383; Lingens v. Austria (1986) 8 European Human Rights Reports 103.

3.2.3(a) Permissible ground of limitation

As discussed above, requirement (a) is satisfied by reference to "public order (ordre public)".

3.2.3(b) Legitimate aim

For present purposes it may be simply accepted that the elimination of political corruption is a legitimate aim and that requirement (b) is, accordingly, also satisfied.

Requirements (c) and (d) however require closer examination.

3.2.3(c) Pressing social need

There is clearly some evidence of political corruption in Australia. In the case of Queensland, at least, there has been recent evidence of long standing and widespread corruption - to which the Minister for Administrative Services referred in his statement of 19 March. There are allegations of corruption in Western Australia presently before a Royal Commission, and criminal proceedings pending related to some of these allegations. Allegations of corruption are also being investigated in other jurisdictions, including Tasmania.

The Minister's statement indicates that the Federal Government intends by legislating in terms of the proposed ban (as well as introducing more comprehensive disclosure requirements) to prevent corruption occurring at the Federal level. (This could be interpreted to concede that no prima fade evidence of such corruption in the Federal political process presently exists.)

It is probable, however, that preventive measures are justified pursuant to this criterion where the harm to be prevented is sufficiently serious, even where there is no conclusive evidence that the harm is presently occurring. Measures to prevent political corruption Federally (and in other jurisdictions where no evidence of present corruption has been shown) would therefore not, per se, be impermissible.

The absence of evidence of present need remains relevant, however, in assessing the proportionality of the measures taken to the need to be addressed. That is, while a "clear and present danger" (in the more stringent terms required by United States jurisprudence on restrictions on First Amendment rights - including freedom of the press) is not an absolute requirement for permissible restrictions under the ICCPR, such a "clear and present danger" would justify more extensive restrictions than a less certain potential threat.

3.23(d) Proportionate means

On the basis of the text of the ICCPR and of the relevant jurisprudence, proportionality of a restriction to permissible ends may be approached in a number of ways.

(I) Is the restriction only what is necessary

Article 19.3 states that restrictions "shall only be such as ... are necessary" for the permitted purposes. If a restriction is overinclusive - that is, restricts the right in question beyond what is necessary for the permitted purpose - it should be regarded as impermissible. Emergency situations, where less precise tailoring of measures may be accepted as possible, are catered for by the derogation provisions in Article 4. This Article requires a "public emergency which threatens the life of the nation", and advice to the United Nations of this and the derogation from rights - rather than by the more routine limitation provisions contained in Article 19 itself. It is clear that the conditions for derogation are not met here, and therefore that the restriction must be permissible under Article 19.3 to be permissible at all.

The proposed ban appears to go beyond what can be shown to be necessary. Indeed it appears to do so in a number of respects:

(i) Bodies affected

First, the proposed ban goes beyond what has been shown to be necessary in relation to bodies affected. Even if it were established that a ban on radio and television advertising by political parties or by groups funded by or associated with political parties were necessary to prevent political parties being improperly influenced, the proposed ban goes beyond this to include advertising by bodies with no such funding or association on the basis that such advertising has some "political" content.

In my considered view there is no evidence that such a restriction on the activities of such bodies (and consequently the rights of their members or of those who wish to receive the information and/or ideas imparted by them through the electronic media) is necessary for the stated purpose. For this purpose it would be necessary for the Government to demonstrate, at least, that it is impracticable to determine which groups are, and which are not, independent from political parties.

(ii) Election related advertising or all political advertising

A complete ban on all political advertising would go beyond what has been demonstrated to be necessary for the purpose advanced. The stated purpose of the proposed ban relates to the expense of advertising for electoral purposes, and the potential of this expense to lead to political corruption. However, a complete ban would apply not only to advertising calculated and likely to influence the result of an election, but to any advertising of a "political" nature at any time. Unless a definition is adopted restricting "political" advertising to advertising calculated to influence the result of an election this is a substantially wider concept. No evidence appears that such extended coverage would be necessary to achieve the stated purpose.

It is not necessary for this purpose to determine at this point whether the former Human Rights Commission was correct in its view that restrictions operating during an election period were permissible (Human Rights Commission, Report no.16: Freedom of Expression and Section 116 of the Broadcasting and Television Act 19¹2). It should not, however, be assumed that the views expressed in that Report represent the views of this Commission and correctly state the present position at international law.

(iii) Scope of "nolitical" advertising

The Minister for Administrative Services indicated in his statement on 19 March 1991 that regard will be had in drafting the proposed legislation to the definition of "electoral matter" in the Commonwealth Electoral Act. The relevant portion of the Minister's statement was as follows:

A total ban will be achieved by an amendment to the 13roadcasting Act 1942. Political advertising will be defined as advertising containing "electoral matter" as currently defined in the Commonwealth Electoral Act. The ban will apply to registered and non-registered political parties and to third party advertising.

The definition in question (provided in section 4 of the Act) states succinctly that:

"electoral matter" means matter which is intended or !Rely to affect voting in an election.

A definition along these lines would address the objection noted above that a ban on all political advertising cannot be justified by reference to the electoral process. It would not, however, provide sufficient restriction on the scope of the ban to render it permissible.

Given the range of social issues which are, or it is argued or proposed should be, the subject of action or decision by government in Australia, and which therefore may be electoral issues, there appears little or no effective limit to the range of matters which might (in the absence of a more restrictive definition) be regarded as "political" and therefore potentially be subject to the proposed ban.

Other areas of the law also suggest that a wide view of what matters are political might validly be taken.

Advertising which advocated changes in the law or in government policy would be within or close to the meaning which, on the basis of relevant principles of the law of trusts, the law would ordinarily ascribe to the term "political". In extradition cases, concerning whether an offence is of a "political character", the courts have similarly taken "political" objects to include not only the object of "overthrowing or changing the government" but also that of "inducing it to change its policy" [Cheng v. Governor of Pentonville Prison [1973] 2 All England Reports 204 at 209 per Lord Diplock].

Unless specific exemptions were provided for advertising by Government or its agencies, advertising promoting a law or program which is the subject of any political contention may also, arguably, be caught by the proposed ban.

For example, any electronic media advertising comprised in the Government's Community Relations Strategy might come within such a ban, since this Strategy is premised on the concept of multiculturalism, which has in itself been the subject of partisan political debate.

Advertising intended to provide information to social security beneficiaries on changes to the law - such as advertising intended to remove confusion regarding "deemed interest" on bank accounts - may even be proscribed as political since the administration of these areas is a matter of continuing political controversy. A similar position could well apply in relation to advertising related to law and justice - including "law and order" advertisements not containing any explicit partisan message - since these areas are also potential or actual areas of political controversy.

Exemptions to permit advertising of government programs or services, or changes to the law, from the proposed ban, while narrowing its reach, would raise additional problems of discrimination - unless similar exemption was provided for advertising critical of such laws, programs and services.

(II) Is the restriction the least restrictive means available for the purpose?

Restrictions are required to be "only ... such as ... are necessary" for the permitted purposes. If means are reasonably available to achieve the permitted purpose which impose less restriction on the rights concerned than the measure proposed or adopted, it cannot be said that the restriction is only such as is necessary.

For the proposed ban not to be regarded as impermissible on this basis, it would need to be shown that less restrictive means - such as requiring disclosure of donations, applying limits to electoral spending, expanding entitlements to *free* time and enforcing and/or strengthening existing laws against corruption - would not be effective in achieving the result aimed for. In my considered view this has not, to this point, been demonstrated.

(III) Proportionality: balancing test

In a number of cases, including Handyside v. United Kingdom (supra), the European Court of Human Rights has applied a more general concept of proportionality, weighing the need and the aim to be achieved against the importance of the right affected and the severity of the restriction thereon. On this basis, in addition to the lack of evidence of immediate need, the overinclusiveness of a complete ban on all electronic media political advertising by all persons at all times and the availability of less restrictive means, the fundamental importance of the rights to freedom of expression and information in a democratic society also weighs against the proposed ban.

3.3 DISCRIMINATION

Article 2.1 of the ICCPR requires States Parties to the Covenant to respect and ensure the rights recognised therein to all individuals within their territory and subject to their jurisdiction:

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.

The effect of this provision is to constitute non-discrimination as one of the elements of each of the substantive rights recognised (as indicated by the European Court of Human Rights [Airey v. Ireland (1979) 2 European Human Rights Reports 305 at 318] by reference to the analogous provision of the European Convention on Human Rights [Article 14]).

In the European context, this means that the Court, if it finds a restriction to be permissible in other respects (that is, by reference to the requirements that the restriction be prescribed by law, and necessary for a permissible purpose), will nonetheless go on to examine whether the restriction is discriminatory, and if it so finds the restriction will be regarded as impermissible. [For example, to set the age for marriage at 18 would not be an impermissible interference with the right to private life, but to set the age at 18 for citizens and 21 for aliens would be impermissible.]

A similar position applies under the ICCPR, including in relation to Article 19.

It would clearly be impermissible, as discrimination on the basis of political opinion in the *exercise* of the right to freedom of expression, to permit advertising promoting the effectiveness of Government enterprises, or promoting or providing information on Government policies and services, and not to permit advertising criticising those enterprises, policies or services.

As already indicated, there are very serious grounds for concern that the proposed ban will have a disproportionate impact, and in my view a discriminatory impact, on those Australians unable to obtain information from the print media - either because

of disability or illiteracy.

While exact figures are unknown, it is certain that a very, large number of Australians in each category would be affected.

For these people, it is particularly important that the right to impart and receive information and ideas "through the media of his [or her] choice", explicitly recognised in ICCPR Article 19.2, be respected - including where this involves transmission of political ideas or information through the electronic media.

4. POLITICAL RIGHTS: ARTICLE 25

The relevant provisions of ICCPR Article 25 specify that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

This fundamental right of every citizen to take part in public affairs depends, in large part, on having equal access to information on public affairs. This right is therefore intimately connected with the right of every person to receive political information and ideas through the media of his or her choice. At least for those people lacking effective access to information through other media (through disability, illiteracy or for other reasons), a ban on political advertising in the electronic media is likely to have a discriminatory impact on their right to take part in public affairs.

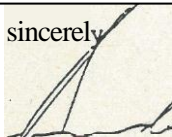
Restrictions on access to information in the media of their choice may also affect the ability of such persons to make informed electoral choices. This would constitute an interference with their rights under Article 25(b) to elections "guaranteeing the free expression of the will of the electors". This is so irrespective of whether any effect on the outcome of an election overall, or for any particular seat, can be demonstrated.

I emphasise, therefore, that this conclusion does not depend on any view that paid political advertising is essential for the overall result of elections to be fair or to represent the will of the electorate. The rights recognised in Article 25 are individual rights. They must therefore be guaranteed and respected for each elector, not simply regarded as a right inhering in the electorate as a whole.

5. CONCLUSION

For the reasons set out, it is therefore clear, in my considered opinion, that the proposed ban on political advertising on radio and television would be inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights. I have not addressed a number of relevant considerations arising from other international human rights pursuant to which Australia has undertaken commitments. These include, in particular, the Declaration on the Rights of Disabled Persons, which is incorporated in Federal legislation. I will be pleased to provide further advice as soon as the Government provides me with the information promised in Senator Bolkus' letter of 26 March.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Brian Burdekin', is written over a light-colored rectangular background. The signature is cursive and somewhat stylized.

..!
BRIAN BURDEKIN
Federal Human Rights Commissioner

