

## SEXUAL ORIENTATION AND INTERNATIONAL HUMAN RIGHTS 2001

*Article 144 of the Namibia Constitution states that international agreements binding upon Namibia “shall form part of the law of Namibia”. This article by the **Legal Assistance Centre** looks at Namibia’s international commitments pertaining to sexual orientation.*

Even though the Namibian Constitution does not make any express mention of sexual orientation, Namibia has an international commitment not to discriminate against anyone on the basis of sexual orientation. This commitment stems from Namibia’s ratification of the International Covenant on Civil and Political Rights on 28 November 1994.

In the *Frank* case recently decided by Namibia’s Supreme Court, the majority opinion referred to this Covenant, noting that its articles dealing with discrimination specify ‘sex’ as one of the grounds on which discrimination is prohibited but not ‘sexual orientation’. With all due respect, this is not quite a correct statement of the actual position. In March 1994 (*before* Namibia’s ratification of the Covenant) the Human Rights Committee charged with monitoring the Covenant stated that the references to “sex” in the provisions on discrimination are “to be taken as including sexual orientation”.

Article 2(1) of the Covenant reads as follows: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” According to the Human Rights Committee, both of these references to “sex” include “sexual orientation” -- and thus prohibit discrimination on these grounds by all states who have ratified the Covenant, including Namibia.

The Human Rights Committee made this statement in response to a communication submitted to it by Nicholas Toonen under the Optional Protocol to the Covenant which allows for individual complaints. (Namibia is also a party to this Optional Protocol.) Mr Toonen claimed that the Covenant was being violated by Tasmania, one of the six states which make up the nation of Australia.

The basis of the complaint was the existence of laws which criminalised sodomy between consenting adults in Tasmania. Although no one had been charged under these laws for several years, Mr Toonen argued that the existence of the criminal sanctions caused him to be afraid to openly expose his sexual preferences or to advocate law reforms pertaining to sexual matters. He also argued that the laws “created the conditions for discrimination in employment, constant stigmatization, vilification, threats of physical violence and the violation of basic democratic rights”. Mr Toonen also drew attention to the fact that prominent members of government in Tasmania, including Members of Parliament, had made derogatory statements about gays and lesbians, and that there was significant public disapproval of homosexuality.

Mr Toonen asserted that the criminal laws in question violated his right to privacy and his right to be free from discrimination under Articles 1 and 26. .

Tasmania tried to justify its criminal sanctions against consensual sodomy on moral and public health grounds, with the spread of HIV being the stated public health concern. The Committee rejected both of these arguments. With respect to public health, the Committee noted that Australia's own national strategy on HIV/AIDS emphasised that laws criminalising homosexual behaviour obstructed public health programmes promoting safer sex. On the issue of morality, the Committee stated that moral issues could not be left totally to the discretion of individual governments, as "this would open the door to withdrawing from the Committee's scrutiny a potentially large number of statutes interfering with privacy". It also noted that laws criminalising homosexual acts had been repealed elsewhere in Australia, and that there was no consensus on the topic even in Tasmania. Furthermore, since the criminal laws against sodomy were not enforced in practice, they could not really be essential to the protection of morals in Tasmania.

The Committee concluded that the criminal laws on sodomy constituted an unreasonable interference with Mr Toonen's right to privacy under Article 17 of the Covenant, which states: "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." Without further elaboration, the Committee then made the observation that "sex" in the provisions on discrimination includes "sexual orientation" and concluded that Mr Toonen's rights under Article 2(1) had also been infringed. It decided that there was no need to consider whether there was also a violation of Article 26, although one member of the Committee wrote a separate opinion suggesting the Committee's conclusion should have been based first and foremost on Article 26. This individual opinion stated that there was a violation of equality before the law on two grounds – the distinction between homosexuals and heterosexuals, and the distinction between male homosexuals and female homosexuals (whose sexual activity was not criminalised).

Australia was given 90 days to report on what action had been taken to comply with the Committee's decision. Tasmania did not give in without a struggle. Australia passed a law entitled the Human Rights (Sexual Conduct) Act which prohibited any of its states from criminalising sexual conduct between consenting adults in private, and Tasmania finally repealed the problematic section in its criminal code in 1997.

The *Frank* case itself emphasised that it is not a licence for discrimination against gays and lesbians

*Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution. What I dealt with in the judgment is the alleged infringements of the Namibian Constitution in that section 26(3)(g) of the Namibia Immigration Control Act does not provide for homosexual partners on a basis equal to that of the spouses in recognised heterosexual marital relationships and the alleged failure of the Board to regard the applicants' lesbian relationship as a factor strengthening the first applicant's application for permanent residence.*

If Namibia is to be respected globally as a nation which upholds basic human rights, its national and international duties not to discriminate against gays and lesbians should be kept in mind.