An Australia Bill of Rights is not essential to protect Australian citizens: a case study of the rights and freedoms of homosexual citizens.

Australia is in the precarious position of being the only 'western' nation with neither a constitutionally entrenched Bill of Rights nor a Bill of Rights enacted as legislation (O'Neill, Rice & Douglas 2004, 1). However this doesn't necessarily mean that the rights of Australian citizens aren't protected, as a Bill of Rights is not the only way to ensure the rights of citizens are protected. The purpose of this paper then, is to examine if a Bill of Rights is necessary to protect Australian citizens from their government. In order to answer this question, the paper will specifically focus on the government of Australia and the protection of non-heterosexual citizens between 1990 and 2005. This essay will argue that a Bill of Rights is not essential to protect citizens from their government and will examine other methods for assuring citizen protection.

The paper will begin by discussing whether current laws in Australia are sufficient to protect homosexuals from discrimination. The paper will then debate if the government's ratification of numerous human rights treaties has in anyway assured the citizens of Australia protection. This issue will be examined in depth because of the importance placed on international institutions such as the United Nations in trying to ensure rights are protected globally. Australia will then be contrasted to a country which has a constitutionally entrenched Bill of Rights – the United States – in order to examine whether a Bill of Rights has been helpful in ensuring the rights of the homosexual citizens of that country.

Terms which will arise in discussing these issues and are worth defining before continuing include *international and social institutions* and *liberal political ideology*. Ryan, Parker and Brown (2003, 79) define the United Nations as an international forum for discussing world issues including the environment, peace and human rights. They also describe social institutions as structures for maintaining order in society, for instance, family and the influence of the Church (157-161). Liberal ideology is defined as a political ideology where freedom of the individual and equality of opportunity are

valued (Ryan, Parker and Brown 2003, 31-33). These terms and ideologies will be explored further throughout the paper.

In order to conclude whether a Bill of Rights is essential to protect human rights, it must first be proven that current legislation insufficiently protects the rights of citizens. Laws within Australian states differ greatly when examining homosexual discrimination. However in New South Wales, Kirby (2005, 36) testifies that there are many examples of discrimination toward homosexuals in every corner of law. Tenbensel (1996, 22) goes further to suggest that Australian human rights cases taken to the international court suggest that democratically elected state parliaments are insufficient to protect the rights of homosexuals. It can therefore be said that at a state level, current legislation is insufficient to ensure the protection of homosexuals. At a federal level the situation is the same. An example of this is the difficulty lesbian couples have trying to access assisted reproductive technology (ART). Prime Minister John Howard (cited in Johnson 2003, 51) has stated that the discussion of homosexual access to ART revolves around the fundamental right of a child to have the care of a mother and father, all other things being equal. This statement reveals the government's view that children growing up with parents in a homosexual relationship are inferior to children raised in a heterosexual environment despite there being no evidence to support this opinion (Johnson 2003, 51). This evidence suggests that at both the state and federal level, discrimination against homosexuals by the government is occurring.

Current laws in Australia therefore don't adequately address the issue of homosexual discrimination and inequality. This fact reflects the government's traditional values of family and the Church as important and influential social institutions. Over the past two decades, the Australian government (both Labor and Coalition) have ratified a number of international treaties to protect the universal rights of individuals. One of these treaties was the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which was signed by Australia in 1991. Since the ratification of this treaty, two cases have been brought against Australia to examine whether certain laws discriminate against the rights of homosexuals. The two cases brought against Australia have had two different outcomes, and will now be discussed.

The first case brought against Australia was *Toonen versus Australia*. In the early 1990s Tasmania was the only state retaining laws making homosexual sex between men illegal (Tenbensel 1996, 15). The legitimacy of these "anti-gay" laws of the Tasmanian Criminal Code (Section 122 and 123) were challenged by Nicholas Toonen who took the case to the Human Rights Committee (HRC) suggesting that they had breached the First Optional Protocol of the ICCPR under Articles 2 and 17, which state:

> Article 2 (1): 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. (1976, 1)
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> Article 17 (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. (1976, 5)

The Human Rights Committee agreed with Mr Toonen, finding that the Tasmanian laws violated the equal protection and privacy of the citizen (Wilets 1994, 22). The HRC recommended the sections be repealed. The Commonwealth couldn't intervene specifically in Tasmania law as this intervention in a single state would be unconstitutional. In saying this, the Commonwealth did accept that the laws discriminated against homosexuals and that they interfered with citizens' right to privacy (Gelber 1999, 333). The federal government, in its external affairs mandate, enacted the Human Rights (Sexual Conduct) Act 1994 which under Section 109 of the Constitution effectively abolished the state law. From this case, we could suggest that Australia's ratification of numerous international treaties is sufficient to protect citizens from their government however on other occasions these agreements have been proven ineffective.

In another case taken to the HRC, Australia's treaty obligations were not enough to result in a just outcome. Lau (2004, 1701) suggests that the *Young v Australia* case was

perhaps more significant than *Toonen* because it raised the issue of homosexuality to an issue of equal opportunity. Mr Young argued that he deserved a government pension because of his status as the same-sex partner of a war veteran who had past away. The HRC declared that the Australian government had no legitimate reason to refuse same-sex partners the same benefits given to heterosexual partners (Lau 2004, 1701). The Committee stated that the decision not to give government pensions to homosexual partners of war veterans breached Article 26 of the ICCPR which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (1976, 7)

Despite this 'ruling' the Commonwealth government has failed to remove or alter these laws. Gelber (1999, 334) explains that when a treaty is ratified by the Commonwealth it does not automatically translate into domestic legislation, nor does the Human Rights Committee have any power to enforce a government's agreement to any international treaty. Kent (2002, 77) argues that the federal governments concern with national sovereignty in its decision not to apply the recommendations of the HRC is both an obstacle to the reach of international human rights treaties in general and is also inappropriate in a globalised world. Kidd (1995, 313) also points out, that the action of the Commonwealth following the *Toonen* case occurred only because the government chose to act rather than it having any legal obligation to do so.

From this discussion it can be seen that the effectiveness of international treaties is also questionable. Gelber (1999, 334) argues that the fact that treaty signing is conducted by the executive, and parliamentary approval is not required, is also a negative element of international treaties. However the signing of treaties via the executive 'back door' hardly matters given their unenforceability. On the other hand, a Bill of Rights not only requires approval from elected officials but also requires public approval via referendum. However, even if a Bill of Rights were to be implemented in Australia it is debatable whether it would protect the rights of homosexuals. This statement is

supported by the fact that in 1994, the United States even with a Bill of Rights and also a party to the ICCPR, was the only western industrialised nation outside of Australia with sodomy laws (Wilets 1994, 22).

The U.S. essentially suggests that it is able to discriminate based on sexual orientation because of the local cultural and religious ideology of Christianity. The U.S. applies an ideology of cultural relativism to sexual orientation rights rather than recognising their universal transcendence (Lau 2004, 1719-1720). The very fact that the U.N. named the Declaration of Human Rights *universal* proves that the international community viewed them as applicable irrespective of any social, cultural or political ideology (Lau 2004, 1692-1693).

Kirby (2005, 46) argues that it is against society's interests to penalise, disadvantage and discourage stable and mutually supportive relationships and mutual economic commitment. This argument is obviously not supported by the Australian and American governments. This suggests that in these nations the traditional institution of the Church is more important than pursuing a liberal political ideology. The fact that in countries both with and without a Bill of Rights, discrimination against homosexuals still occurs suggests that even this most fundamental statement of rights cannot protect all members of society. Even if a Bill of Rights were to be introduced in Australia, it still would not guarantee the equal treatment of Australia citizens as evidenced in the U.S. discussion. In order to protect the rights of citizens, governments should place more importance on their commitment to international agreements. Governments should give more power to the Human Rights Committee to enable it to enforce its findings and should continue to enact international treaties into domestic law.

In conclusion, this essay has argued that a Bill of Rights is not essential to ensure the rights of citizens are met. Evidence of government discrimination against homosexuals was given as well as evidence of the insufficiencies of relying on international treaties to protect citizens. A comparison between homosexual discrimination in Australia and the U.S. also found that even with a Bill of Rights, discrimination can continue. While a

Bill of Rights may help to ensure the rights of citizens are met, it is not essential to protect individuals from their government.

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