

HUMAN RIGHTS COMMITTEE

Young v. Australia

Communication No. 941/2000

6 August 2003

CCPR/C/78/D/941/2000

VIEWS

Submitted by: Mr. Edward Young (represented by counsel Ms. Michelle Hannon and Ms. Monique Hitter)

Alleged victim: The author

State party: Australia

Date of communication: 29 June 1999 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 6 August 2003,

Having concluded its consideration of communication No. 941/2000, submitted to the Human Rights Committee on behalf of Mr. Edward Young under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Edward Young, an Australian citizen, born on 7 May 1935 and currently residing in the state of New South Wales. He claims to be a victim of a violation by Australia of article 26 of the Covenant. He is represented by counsel.

The facts as presented by the author

2.1 The author was in a same-sex relationship with a Mr. C for 38 years. Mr. C was a war veteran, for whom the author cared in the last years of his life. He died on 20 December 1998, at the age of 73. On 1 March 1999, the author applied for a pension under section 13 of the Veteran's Entitlement Act ("VEA") as a veteran's dependant. On 12 March 1999, the Repatriation Commission denied the author's application in that he was not a dependant as defined by the Act. In its decision the Commission sets out the relevant legislation as follows:

Section 11 of the Act states:

"dependant, in relation to a veteran (including a veteran who has died), means

(a) the partner;"

Section 5E of the Act defines a "partner, in relation to a person who is a "member of a couple", [as] the other member of the couple."

The notion of couple is defined in section 5E(2):

"a person is a "member of a couple" for the purposes of this Act if:

(a) the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or (b) all of the following conditions are met:

(i) the person is living with a person of the opposite sex (in this paragraph called the partner);

(ii) the person is not legally married to the partner;

(iii) the person and the partner are, in the Commission's opinion (...), in a marriage-like relationship;

(iv) the person and the partner are not within a prohibited relationship for the purposes of Section 23 B of the Marriage Act 1961."

The decision reads "The wording of Section 5E (2) (b) (i)(...); the text that I have highlighted - is unambiguous. I regret that I am therefore unable to exercise any discretion in this matter. This means that under legislation, you are not regarded as the late veteran's dependant. Because of this you are not entitled to claim a pension under the Act."

The author was also denied a bereavement benefit under the Act, as he was not considered to be a "member of a couple". (1)

2.2 On 16 March 1999, the author applied to the Veterans Review Board ("VRB") for a review of the Commission's decision. On 27 October 1999, the Board affirmed the Commission's decision, finding that the author was not a dependant as defined by the Act. In its decision the Board outlines

the legislation as above and considers that it "has no discretion in its application of the Act and in this case it is bound to have regard to Section 11 of the Act. Hence, under the current legislation, the Board is required to affirm the decision under review in relation to the status of the applicant".

2.3 On 23 December 1999, the Human Rights and Equal Opportunity Commission ("HREOC") denied the author's complaint to that body, stating that as the author had been subjected to the automatic and non-discretionary operation of legislation, the Commission had no jurisdiction to intervene.

The complaint

3.1 The author complains that the State party's refusal, on the basis of him being of the same sex as his partner, that is, due to his sexual orientation, to provide him with a pension benefit violates his right to equal treatment before the law and is contrary to article 26. He concedes that article 26 does not compel a State party to enact particular legislation, but argues that where it does, the legislation must comply with article 26. The author recalls that in *Broeks v. the Netherlands*,⁽²⁾ *Zwaan de Vries v. the Netherlands*,⁽³⁾ and *Danning v. the Netherlands*,⁽⁴⁾ the Committee, in principle, found social security legislation to be subject to article 26. He also recalls that in *Toonen v. Australia*⁽⁵⁾ the Committee recognized sexual orientation as a proscribed ground for differentiation under article 26.

3.2 The author argues that although he could have appealed to the Commonwealth Administrative Appeals Tribunal ("AAT") such an appeal would have had no prospect of success, as it would also have been bound by the provisions of the VEA.

The State party's submission on the admissibility and merits of the communication

4.1 By *note verbale* of 1 May 2001, the State party comments on the admissibility and merits of the communication. It considers the meaning of the rights protected under article 26 and distinguishes between "equality before the law" and "equal protection of the law". The former, it contends, is not directed at legislation but rather exclusively at its enforcement and means that judges and administrative officials must not act arbitrarily in enforcing laws.⁽⁶⁾ The latter, it argues, relates to the substance of the laws as well as their application.⁽⁷⁾ Although the author refers to 'equality before the law' in his communication, the State party does not understand this to relate to an alleged breach of this aspect of article 26. Rather than alleging arbitrary action by judges or officials, the State party understands the author to be alleging that the law itself is discriminatory, and that he raises the issue of equal protection of the law under article 26.

4.2 The State party challenges the admissibility on three grounds. Firstly, it argues that the author is not a victim within the meaning of article 1 of the Optional Protocol, pursuant to which the Committee has indicated⁽⁸⁾ that an author must provide evidence that he/she is personally affected by an act or omission by the State party. Although the State party endorses the decisions of the domestic authorities rejecting the author's application for a pension, it does not endorse the reasons articulated by these bodies for so disposing of it. It argues that a thorough examination of the facts and their application to the VEA reveals that no partner of Mr. C, whether homosexual or

heterosexual, would have been entitled to the pension under the VEA. Consequently, the State party argues that neither the author's sexual orientation nor the sexual orientation of Mr. C is determinative of the issue.

4.3 The State party notes that the author applied for a pension under the VEA and that the eligibility provisions are dealt with in Division 2 of Part II of the VEA. Section 13 sets out the criteria for 'eligibility for pension'. According to the State party, in order to prove that he has been the subject of unlawful discrimination, the author must first establish that he is able to satisfy the entitlement provisions in section 13.

4.4 The State party explains that section 13 provides five separate grounds for entitlement to the pension. In particular, section 13(1) allows a dependant, including the partner, of a veteran to claim the pension where the veteran's death was 'war-caused'. The State party argues that the records of the Department of Veterans' Affairs do not show that Mr. C's death was 'war-caused', nor does the author allege that his death was 'war-caused'. Therefore, it submits that, no heterosexual or homosexual partner of Mr. C could have been entitled to the pension under subsection (1). The State party then goes on to apply the facts of the author's case to the other subsections of article 13 in an attempt to demonstrate that regardless of relationship, the author would not have been eligible for a pension, as Mr. C was not a veteran to whom one of the requisite provisions applied. It submits that since the author was in any event not entitled to that benefit, he has not established a *prima facie* entitlement to the pension and therefore is not a victim for the purposes of article 1.

4.5 Secondly, the State party recalls the Committee's jurisprudence (9) and argues that the author has not sufficiently substantiated his case for the purposes of admissibility. To raise a *prima facie* case, the State party argues that the author must establish that he was denied a benefit that would have been available to a heterosexual partner of Mr. C as a matter of entitlement under law and refers back to its arguments in paragraphs 4.2 to 4.4 above. It submits that the author failed to evaluate properly all the facts of the case and the application of those facts to section 13 of the VEA, and that therefore he is unable to substantiate the claim that his lack of entitlement to the pension under the VEA is determined by a distinction based on sexual orientation in breach of article 26.

4.6 Thirdly, the State party argues that the author has not exhausted domestic remedies for the purposes of admissibility. In referring to the Committee's jurisprudence (10), the State party submits that the balance of opinion in the Views of the Committee is that a remedy must have no chance of success in order for an author to successfully claim that the particular remedy does not need to be exhausted before a communication can be declared admissible.

4.7 The State party submits that the author could have appealed the decision not to grant him the pension to the AAT and provides the following information on this tribunal. The AAT was created by Federal statute and has the power to affirm or quash a decision, and to remit the matter to the original decision-maker to make a new decision, vary a decision or replace the original decision with a new one. In exercising this power, the role of the AAT is to determine the 'correct or preferable decision' in relation to a particular matter. In performing its functions, the AAT as a matter of course conducts a thorough examination of all the facts. The AAT is not bound to use only the information

available to the original decision-maker, and may consider information not known at the time of the original decision. A party to a matter heard by the AAT may seek judicial review of a decision in the Federal Court.

4.8 The State party submits that the AAT would in all likelihood have concluded that the author, like any heterosexual or homosexual partner of Mr. C, was not entitled to a pension under section 13 of the VEA. This decision would have been based on either: (1) the failure of Mr. C to meet the requirements in section 13 of the VEA upon which partner entitlement to the pension depends, in particular those relating to serious disability or death caused as a result of war service (as outlined in para. 4.2 to 4.4); or (2) the author's failure to provide sufficient evidence of his allegedly *de facto* relationship with Mr. C (the State party provides further information on this argument in the merits). The State party submits that a decision of the AAT based on either or both of these grounds would not involve any distinction upon which a breach of article 26 could be founded and this matter would not have been brought to the Committee.

4.9 On the merits, the State party argues that, notwithstanding the reasons provided by the decision-making bodies in the author's case, the sexual orientation of Messrs C and the author was not determinative of the author's entitlement to the pension, and for the purposes of the Committee's consideration of the communication, the author's allegation lacks any merit. The State party supports this submission on two grounds. Firstly, the State party alleges that no heterosexual or homosexual partner of Mr. C would have been entitled to the pension under section 13 of the VEA. Secondly, the State party submits that in any case the author had failed to provide sufficient information to establish that he was in fact the partner of Mr. C. Therefore, and notwithstanding the author's inability to meet the eligibility criteria set out in the VEA, the State party submits that the decision-making bodies could not have been satisfied that the threshold requirement of establishing the existence of a *de facto* relationship had been met.

4.10 The State party submits that the author provided insufficient evidence in support of his claim that he was the *de facto* partner of Mr. C. Thus, on a proper application of the facts, as presented by the author to the relevant law, the State party submits that no distinction was made that was not based on or justified by reasonable and objective criteria. The State party underlines the importance of disbursing Government funds where they are most needed. Thus, it is common practice to impose eligibility criteria in relation to social security payments and the State party notes the Committee's recognition of the rights of States to subject the payment of social security benefits to eligibility criteria. (11)

4.11 The State party explains that the criterion of properly evidencing the existence of a *de facto* relationship is one of the criteria that must be met before a person is entitled to a dependant's pension under the VEA. According to the State party, Mr. C did not indicate in correspondence with the Department that he was anything other than single. (12) The Department requires evidence of relationships to determine the entitlement to pension benefits. In this regard, the application form for a war widower's pension states:

"Please attach a copy of your marriage certificate or evidence of your relationship with the

deceased veteran, unless you have previously supplied this material to the Department. "

4.12 The State party submits that, other than the author's application for a pension, the only evidence provided by the author is his name as Mr. C's partner on the latter's death certificate. It submits that information on New South Wales death certificates, including that relating to spouses, is not considered to be probative of the accuracy of the information. It is submitted that, in isolation, the information on the death certificate is insufficient to establish that the author was the partner of Mr. C for the purposes of the VEA. It further submits that the Department would note evidence of, for example, shared expenses, cohabitation or sharing of significant experiences, correspondence, benefaction under a will and statements from family or mutual friends or acquaintances.

4.13 The assessment of whether the author was in fact Mr. C's partner was no different from the assessment that would have applied to any heterosexual or homosexual person claiming to be the partner of a veteran. In the absence of additional evidence, the Department could not have been satisfied that the author was the partner of Mr. C. The State party submits that this application of the assessment process prevents an issue of equal protection of the law from arising. It also submits that there is no evidence of arbitrary actions on the part of officials in the Department that would support a finding that the author's guarantee of equality before the law has been breached (para. 4.1 above).

4.14 In conclusion, the State party submits that, the author failed to provide sufficient evidence of his status as a *de facto* partner of Mr. C and, this would have provided additional grounds for refusing to grant the author the pension. This refusal, according to the State party does not give rise to a breach of the author's rights under article 26.

Comments by the author

5.1 By submission of 17 August 2001, the author reiterates that he is a victim for the purposes of article 1 of the Optional Protocol in that he is a natural person who was personally affected by the fact that he was denied a pension by reason of his sexual orientation. He reiterates that both the Repatriation Commission and the VRB made it clear that the reason for rejection of his application was because his partner was not a member of the opposite sex, i.e. because of his sexual orientation.

5.2 The author notes that, although the State party submits that it does not affirm the reasons of the Repatriation Commission and the VRB for rejecting his application, it does not deny that sexuality is a criteria relevant to the granting of pensions under the VEA and that the author's sexuality prevents him from satisfying that criteria. He further argues that the State party does not contend that any other domestic bodies reviewing his application would make a different finding on his eligibility for a pension as a dependant.

5.3 With respect to the State party's argument that the author is not a victim because he could be denied a pension under the VEA based on a number of other criteria which do not relate to his sexuality, the author submits that his eligibility to meet these other criteria is not relevant to his status as a victim for the following reasons: even if he meets the criteria in sub-section 13 he would still not

be entitled to a pension because he would not meet the definition of dependant. In the author's view, it is important to distinguish between cases such as *Hoofdman v. the Netherlands*, (13) where it is evident that an individual would not be entitled to some State benefit on grounds other than the discriminatory grounds proscribed by the Covenant, and cases where the entitlement to a benefit is arguable and requires a proper and fair hearing by an appropriate State administration body for the determination of eligibility.

5.4 The author argues that he had no opportunity to demonstrate whether or not he can meet the criteria of these sub-sections. He acknowledges that he could not meet the criteria in respect of certain subsections of section 13, which would entitle him to a pension, but he maintains that he has not yet been given the opportunity to establish that he meets the criteria under other subsections of section 13 which would also provide such an entitlement. He submits that, although in its submission the State party made assumptions about his ability to meet these various criteria, the State party has vested domestic bodies, including the VRB, with jurisdiction to determine whether the criteria in question have been met.

5.5 The author contends that, in making assumptions at this stage about his ability to meet these criteria, the State party again discriminates against him because citizens in heterosexual relationships seeking such a pension under the above-mentioned sub-sections would be able to meet criteria assessed by the Repatriation Commission, the VRB or other decision-making bodies. Such bodies review all the evidence regarding the matter. The author submits that the State party is yet to see the author's evidence or hear his arguments as to how he might meet these criteria. In addition, the author states that to require him to seek further review when it is clear it will not ultimately result in a different outcome is also discriminatory. He argues that he is being treated unequally under the law simply by being excluded on the basis of his sexuality even if he cannot establish that he meets the other criteria for a pension.

5.6 On the issue of exhaustion of domestic remedies, the author states that as the VRB clearly stated that it had no discretion to make a finding other than one which excludes the author from eligibility for a pension on the basis of his failure to meet with the definition of a dependant, it would not be open to the AAT or the Federal Court of Australia to make a different finding. According to the author, under Australian law when the meaning of a provision of a statute is clearly stated in that statute the decision-making body has no power to interpret it differently. Section 5(E) is very clear in requiring a person claiming to be a member of a couple, in order to be a partner and therefore a dependant under the Act, to be in a heterosexual relationship.

5.7 According to the author, this provision leaves no room for any decision-making bodies to exercise their discretion to include same sex partners within the definition even if the body thought it just and reasonable to do so. He argues that jurisprudence in relation to the interpretation of terms such as "partner", "spouse" and "couple" has failed to include same sex relationships even when there has been discretion to do so because the term has never been defined further. The author notes that the State party does not contend that the AAT or the Federal Court could have come to any different interpretation on this point. At best, he notes its claim that the AAT might have found other

grounds in addition to the "discriminatory ground" to exclude the author from receiving a pension.

5.8 The author argues that the Committee's jurisprudence (14) only requires him to establish that seeking further review of the reasons articulated for denying a benefit would be futile. It does not require him to seek further domestic remedies on the basis that other decision-making bodies might find him ineligible on grounds which were not of concern to the decision-making bodies which had actually assessed his application. He further submits that no responsibility should be placed on him to seek a review of a decision in order to exhaust domestic remedies, other than in relation to that aspect of the decision which he claims violates the Covenant.

5.9 The author reiterates that he did attempt to have HREOC examine his claim that the limitation of pension payments under the Act to heterosexual partners of veterans was a breach of article 26 of the Covenant. He submits that, in its response, HROEC stated that the resources of the Commission do not permit it to conduct an examination of entitlements for same sex couples under the provisions of the VEA and that it was unable to investigate the matter on any other basis as it was not a matter where the decision-maker had any discretion in determining whether or not the author fell within the provisions of a dependant as defined by the VEA.

5.10 The author refutes the State party's contention that it was likely that had he appealed his case to the AAT it would have refused his application on grounds other than his sexuality. He contends that the State party is incorrect in its argument that he would not have been entitled to a pension under section 13 of the VEA, and argues that neither of the review bodies which were empowered to consider his application indicated that they had any concern with his ability to meet the criteria in the sub-sections of section 13. He states that Mr. C was not a smoker until he entered the army and that the effects of smoking contributed to his death. Under Australian jurisprudence, veterans who died from a smoking related illness have been found to have died from a war-caused injury, and satisfied section 13, if the reason for smoking was related to enlistment in the army. According to the author, applications for pensions under the VEA based on a war-caused injury by dependants of veterans have been accepted even when the connection between the veteran's death and his war-caused injury was made only posthumously.

5.11 Finally, on the issue of exhaustion of domestic remedies, the author submits that he is of limited means, having no assets and receiving only a Department of Social Security pension, and is not in a financial position to pursue legal options.

5.12 On the merits, the author provides further argument on the issue of the evidence provided pertaining to his relationship with Mr. C. He submits that the suggestion that he was denied a pension because of his failure to provide sufficient evidence of his relationship with Mr. C is inconsistent with the written decisions of the Repatriation Commission and the VRB, which accepted the existence of his relationship with Mr. C. He submits that he could satisfy other review bodies of their relationship, (15) and argues that both decisions indicate that they denied the author's application because he could not meet the definition of dependant, that is, due to his sexual orientation. The VRB expressly accepted the existence of the author's relationship with Mr. C. (16)

5.13 The author argues that given the Australian, and particularly the Department of Defence and Veteran Affairs', attitudes to same-sex relationships, as demonstrated by the Department's refusal to recognise the validity of such relationships (17), it is not surprising that Mr. C responded the way he did on the documents referred to by the State party at paragraph 4.11. Nothing in these documents denies his relationship with Mr. C or amounts to evidence that there was no such relationship. There is no provision in any of the documents referred to which would have allowed Mr. C to describe his relationship with the author as there is no reference to "partner".

Supplementary submissions by the parties

6.1 On 7 February 2002, the State party informed the Committee that the mere fact that it does not respond to all of counsel's assertions and allegations does not mean that it accepts them as true and correct. It denies the author's allegation that by making assumptions about his ability to meet other criteria of the VEA, the Australian Government is again discriminating against him. It explains that it applied the author's factual circumstances to an examination of the eligibility of either a heterosexual or homosexual applicant for a pension under the VEA not in order to discriminate against the author but rather to answer the allegations made by him to the fullest extent possible. In its view, an examination of the criteria was necessary to answer the allegations and would have been undertaken regardless of the author's sex or sexual orientation.

6.2 On the author's argument that the requirement to seek further review when it is clear it will not result in a different outcome is ultimately also discriminatory, the State party submits that merely informing the Committee of the options that were available to the author is in no way discriminatory. The State party refutes the allegation that decisions of the domestic organs were in and of themselves discriminatory and argues that the author's application was given the same consideration as that of other applicants.

6.3 With respect to the author's claim that he was not given the opportunity to demonstrate whether or not he meets the criteria of section 13 of the VEA, the State party reiterates that the author was free to appeal the decision of the VRB to the AAT. In performing its functions, the AAT conducts a full review of the contested decision, and the author would have been entitled to demonstrate whether or not he met the section 13 criteria.(18)

6.4 The State party submits that while not coming to any conclusions as to the veracity of the additional evidence adduced by the author on this relationship with Mr. C, such evidence should have been presented to the AAT. The State party recalls that it is not the function of the Committee to act as a court or tribunal evaluating evidence.

7.1 On 2 April 2002, the author provided further comments on the State party's response. The author largely reiterates the arguments made in previous submissions. On his argument that he was discriminated against as he was not afforded the opportunity to have his ability to meet the criteria in section 13 assessed by the Repatriation Commission or the VRB, he argues that it was because his case was disposed of on the basis of his sexuality that his ability to meet the other criteria of the VEA was not assessed by a review body. A heterosexual applicant would have had the other criteria

assessed by a review body thus removing the opportunity for the State party to undertake this assessment at this stage i.e. in its submission to the Committee.

7.2 In addition, the author states that he did not deny that he had a right to review in theory but argues that to require a person to pursue futile claims through a complex, time consuming and costly legal process which will ultimately result in the original decision being confirmed is discriminatory. The author maintains that the decisions of the Repatriation Commission and the VRB are discriminatory.

7.3 With respect to the information provided by him on the Australian Defence Force policies, the author maintains that this information demonstrates the attitude of the Defence Forces towards same-sex relationships generally. He also directs the Committee to the Defence Force website to support and substantiate his arguments on the Defence Forces attitude to same sex relationships. According to the author, it is clear from this website that a range of benefits are available to the families of Defence Force Personnel but only to "married" and "de facto" families of Defence Force personnel. The author submits that this excludes same sex partners.

8.1 On 16 May 2002, the State party reiterated that although it did not intend to comment further on the author's arguments, it did not necessarily accept the author's comments or allegations as true or correct.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2 (a) of the Optional Protocol.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that the author is not a victim as, regardless of the decisions of the domestic authorities, he has not established that he had a prima facie entitlement to a pension and therefore his sexual orientation is not determinative of the issue. The Committee recalls that an author of a communication is a victim within the meaning of article 1 of the Optional Protocol, if he/she is personally adversely affected by an act or omission of the State party. The Committee observes that the domestic authorities refused the author a pension on the basis that he did not meet the definition of being a "member of a couple" by not having lived with a "person of the opposite sex". In the Committee's view it is clear that at least those domestic bodies seized of the case, found the author's sexual orientation to be determinative of lack of entitlement. In that respect, the author has established that he is a victim of an alleged violation of the Covenant for purposes of the Optional

Protocol.

9.4 The Committee notes the State party's argument that the author has not exhausted domestic remedies as he did not appeal his case to the AAT, which would likely have concluded that the author was not entitled to a pension on grounds other than (or in addition to) those relating to his sexual orientation and which would not involve any distinction upon which a breach of article 26 could be founded. The Committee notes that the State party does not claim that the AAT would (or even could) have arrived at a different outcome to that of the VRB but may merely have applied different reasoning to dispose of his claim. Moreover, the State party does not argue that the AAT could have come to a different interpretation of the impugned sections of the VEA (sections 5(E), 5(E) 2 and 11), on the basis of which the author's application was denied. Neither does it indicate any other domestic body (at either Federal or State level) to which he would have had recourse to challenge the legislation itself. The Committee also notes that it is clear from the legislation that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The Committee recalls that domestic remedies need not be exhausted if they objectively have no prospect of success: where under applicable domestic laws the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result. (19) Taking into account the clear wording of the sections of the VEA in question, and noting that the State party itself admits that an appeal to the AAT would not have been successful, the Committee concludes that there were no effective remedies that the author might have pursued. As the Committee can find no other reason to consider the communication inadmissible it proceeds to a consideration of the merits.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The author's claim is that the State party's refusal to grant him a pension on the ground that he does not meet with the definition of "dependant", for having been in a same-sex relationship with Mr. C, violates his rights under article 26 of the Covenant, on the basis of his sexual orientation. The Committee notes the State party's argument that had the domestic authorities applied all the facts of the author's case to the VEA it would have found other reasons to dispose of the author's claim, reasons that apply to every applicant regardless of sexual orientation. The Committee also notes that the author contests this view that he did not have a prima facie right to a pension. On the arguments provided, the Committee observes that it is not clear whether the author would in fact have fulfilled the other criteria under the VEA, and it recalls that it is not for the Committee to examine the facts and evidence in this regard. However, the Committee notes that the only reason provided by the domestic authorities in disposing of the author's case was based on the finding that the author did not satisfy the condition of "living with a person of the opposite sex". For the purposes of deciding on the author's claim, this is the only aspect of the VEA at issue before the Committee.

10.3 The Committee notes that the State party fails specifically to refer to the impugned sections of the Act (sections 5(E), 5(E) 2 and 11) on the basis of which the author was refused a pension because he did not meet with the definition of a "member of a couple" by not "living with a member of the opposite sex". The Committee observes that the State party does not deny that the refusal of a pension on this basis is a correct interpretation of the VEA but merely refers to other grounds in the Act on which the author's application could have been rejected. The Committee considers, that a plain reading of the definition "member of a couple" under the Act suggests that the author would never have been in a position to draw a pension, regardless of whether he could meet all the other criteria under the VEA, as he was not living with a member of the opposite sex. The State party does not contest this. Consequently, it remains for the Committee to decide whether, by denying a pension under the VEA to the author, on the ground that he was of the same sex as the deceased Mr. C, the State party has violated article 26 of the Covenant.

10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. (20) It recalls that in previous communications the Committee found that differences in the receipt of benefits between married couples and heterosexual unmarried couples were reasonable and objective, as the couples in question had the choice to marry with all the entailing consequences. (21) It transpires from the contested sections of the VEA that individuals who are part of a married couple or of a heterosexual cohabiting couple (who can prove that they are in a "marriage-like" relationship) fulfill the definition of "member of a couple" and therefore of a "dependant", for the purpose of receiving pension benefits. In the instant case, it is clear that the author, as a same sex partner, did not have the possibility of entering into marriage. Neither was he recognized as a cohabiting partner of Mr. C, for the purpose of receiving pension benefits, because of his sex or sexual orientation. The Committee recalls its constant jurisprudence that not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria. The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal a violation by Australia of article 26 of the Covenant.

12 Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee concludes that the author, as a victim of a violation of article 26 is entitled to an effective remedy, including the reconsideration of his pension application without discrimination based on his sex or sexual orientation, if necessary through an amendment of the law. The State party is under an obligation to ensure that similar violations of the Covenant do not occur in the future.

13 Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has

recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views. The Committee is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

* The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco DePasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

An individual opinion signed by Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale is appended to the present document.

Appendix

Individual opinion by Committee members Mrs. Ruth Wedgwood and Mr. Franco DePasquale (concurring)

Many countries recognize a right of privacy in intimate relationships, enjoyed by all citizens regardless of sexual orientation. In 1994, this Committee grounded a similar right on Article 17 of the Covenant on Civil and Political Rights - finding, in its views on *Toonen v. Australia*, (22) that Tasmanian penal statutes purporting to criminalize "unnatural sexual practices" amounted to an "arbitrary or unlawful interference with privacy." In *Toonen*, the federal government of Australia represented to the Committee that the Tasmanian criminal law indeed amounted to "arbitrary interference with [Mr. Toonen's] privacy" and "cannot be justified" on policy grounds.(23) Laws penalizing homosexual activity had already been repealed in other Australian states, with the exception of Tasmania, and this Committee's decision seems to have served as a means for Australia to overcome barriers of federalism.

In *Toonen*, the author had complained that the Tasmanian criminal code did "not distinguish between sexual activity *in private* and sexual activity *in public* and bring[s] private activity *into the public domain*." (24)(Emphasis added.) The Committee's ruling was founded on the right to be left alone, where there are no reasonable safety, public order, health or moral grounds offered by the state party to justify the interference with privacy.

The current case of *Edward Young v. Australia* poses a broader question, where various states parties may have decided views ~ namely, whether a state is obliged by the Covenant on Civil and Political Rights to treat long-term same-sex relationships identically to formal marriages and "marriage-like" heterosexual unions ~ here, for the purpose of awarding pension benefits to the surviving dependents of military service personnel. Writ large, the case opens the general question of positive rights to equal treatment; whether a state must accommodate same-sex relationships on a par with more traditional forms of civil union.

On the facts and in the particular posture of this case, the Committee has concluded that the differentiation made by Australia between same-sex and heterosexual civil partners has not been sustained against Mr. Young's challenge. The trespass is not based on a right of privacy under Article 17, but rather on the claimed right to equality before the law under Article 26 of the Covenant.

But two observations must be made about the limits of the Committee's disposition of this case, pertinent to future practice.

First, as a general matter, complainants should be held to their duty of exhausting local remedies, including full rights of local appeal, before any communication is judged on the merits by this Committee. We have no basis to assume that Australian courts would be unable or unwilling to interpret Australian statutory law in light of the treaty norms voluntarily adopted by Australia. Even if a legal system has not formally incorporated the Covenant within its domestic law, the Covenant may serve as a persuasive benchmark in making judgments about Parliamentary intent. The Committee should not assume that international law only operates from the outside on national legal systems. Nor can the Committee demand that rights must be incorporated by open citation of the Covenant. It is the substance, rather than the nomenclature that counts, and some national court systems may prefer to explain their choices in light of constitutional, common law, or civil law norms, even while protecting the substance of Covenant rights. Certainly if the volume of individual communications under the Optional Protocol of the Covenant continues to increase, the Committee will have to exercise greater discipline in consigning to the national courts the decisions that are properly theirs.

In this case, Mr. Young applied for a pension as a veteran's dependent, claiming status as the survivor of Mr. C. The Australian Repatriation Commission found that Mr. Young did not qualify as a statutory dependent under Australian law, despite a long domestic relationship described by Mr. Young. (25) On first appeal, the Australian Veterans Review Board affirmed the denial of benefits to Mr. Young. But the complainant did not take further available appeals to the Commonwealth Administrative Appeals Tribunal or to the Federal Court of Australia, and there is nothing in our record to show that these steps would have been futile.

Second, the posture of the instant case limits the reach of our decision. Australia has contested the admissibility of the communication only on the fact-specific claims (1) that Mr. C has not been shown to have suffered a "war-caused" death and hence would not be able to pass on pension rights to any dependent at all, and (2) that there is insufficient evidence of a durable relationship between

Mr. Young and Mr. C.

In a case of this moment, it is perhaps surprising that Australia has not chosen to enter into any discussion, pro or con, on the merits of the claim made under Article 26 of the Covenant. Australia has offered no views concerning Mr. Young's argument that the distinction made by statute between same sex and heterosexual civil partners is unfounded, and the Committee has essentially entered a default judgment. Under Covenant jurisprudence, a state party must offer "reasonable and objective criteria" for making any distinction on grounds of sex or (according to our "guidance" to the state party in paragraph 8.7 of the *Toonan* case) on grounds of sexual orientation. Yet, as the Committee notes in paragraph 10.4 of the instant case of Mr. Young, "The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced." In every real sense, this is not a contested case.

Many governments and many people of good will share an interest in finding an appropriate moral and legal answer to the issues and controversies of equalizing various government entitlements between same-sex and heterosexual couples, including the disputed claim that there is a trans-jurisdictional right to recognition of gay marriage. There is an equally engaged debate within many democracies on whether military service should continue to be limited to heterosexual persons.

In the instant case, the Committee has not purported to canvas the full array of "reasonable and objective" arguments that other states and other complainants may offer in the future on these questions in the same or other contexts as those of Mr. Young. In considering individual communications under the Optional Protocol, the Committee must continue to be mindful of the scope of what it has, and has not, decided in each case.

[signed] Ruth Wedgwood

[signed] Franco DePasquale

Notes

- (1) The author does not make any specific claim on this fact.
- (2) Case No. 172/1984, Views adopted on 9 April 1987.
- (3) Case No. 182/1984, Views adopted on 9 April 1987.
- (4) Case No. 180/1984, Views adopted on 9 April 1987.
- (5) Case No. 488/1992, Views adopted on 31 March 1994.

(6) The State party refers to the *travaux préparatoires* of the Covenant and its Views in the communications of *Broeks v the Netherlands*, *Danning v the Netherlands*, *Zwaan de Vries v the Netherlands*, *supra*.

(7) The State party refers to UN Doc. A/42/40, page 139, paragraphs 12.1 to 1.13 and the communications *Broeks v. the Netherlands*, *Danning v the Netherlands* and *Zwaan de Vries v the Netherlands*, *supra*.

(8) The State party refers to the following communications in an attempt to show that the author has not sufficiently demonstrated that he is a victim: *J.H v. Canada*, Case No. 187/1985, Decision adopted on 12 April 1985; *Tadman et al v. Canada*, Case No. 816/1998, Decision adopted on 29 October 1999; *de Groot v Netherlands*, Case No. 578/1994, Decision adopted on 14 July 1995; *Toonen v Australia*, *supra*.

(9) The State party refers to the following reports of the Human Rights Committee in UN Documents A/48/40, paragraph 781; A/47/40, paragraph 625; A/46/40, paragraph 679; A/45/40, paragraph 608; A/44/40, paragraph 633; A/43/40, paragraph 654; A/39/40, paragraph 588; A/52/40, paragraph 478; A/51/40, paragraph 388; A/50/40, paragraph 500; *Oló Bahamonde v Equatorial Guinea*, Case No. 468/1991, Views adopted on 20 October 1993; *J. A. M. B.-R. v. the Netherlands*, Case No. 477/1991, Decision adopted on 7 April 1994.

(10) The State party refers to the following communications: *Kelly v Jamaica*, Case No. 537/1993, Views adopted on 17 July 1996; *Henry et al. v Jamaica*, Case No. 571/1994, Views adopted on 25 July 1996; *Pereira, on behalf of Colamarco Patino v Panama*, Case No. 437/1990, Decision adopted on 21 October 1994; *G v Canada*, Case No. 934/2000, Decision adopted on 17 July 2000; *A v New Zealand*, Case No. 754/1997, Views adopted on 15 July 1999; *Mansur et al. v the Netherlands*, Case No. 883/1999, Decision of 5 November 1999; *Maille v France*, Case No. 689/2000, Views adopted on 10 July 2000; and *Gómez Vázquez v Spain*, Case No. 701/1996, Views adopted on 20 July 2000.

(11) The State party refers to *Neefs v the Netherlands*, Case No. 425/1990, Views adopted on 15 July 1994, as an example.

(12) The State party provides and refers to the following documents submitted by Mr. C to support this view (a) Claim for Service Pension by a Veteran or Mariner, pages 2, 3, 5 and 6; (b) Lifestyle Report, particularly Section 2 'Personal Relationships', in which there is no reference to a partner, and Section 4 'Recreation and Community Activities', in which Mr. C says that he rarely receives visitors either by friends or family; (c) Medical Examination – Psychiatric, in which there is no reference to a partner.

(13) Communication No. 602/1994, Views adopted on 3 November 1998. In this case, the Committee held, on the merits, that "on the basis of the information before it, it appears that the author, even if he had been married to his partner rather than cohabitating with her without marriage, would not have been entitled to a pension under the AWW, since he was under 40 years

of age, not unfit for work and had no unmarried children to care for. The matter before the Committee is thus confined to the entitlement to a temporary benefit only."

(14) The author refers to: *Barzhig v. France*, *supra*; *Collins v. Jamaica*, Case No. 356/1989, Views adopted on 12 May 1993; *Maille v France*, *supra*; and *Gómez Vázquez v Spain*, *supra*.

(15) The author provides a statement regarding his relationship with Mr. C and eight statements from others attesting to the existence of a genuine and longstanding relationship between them. In the author's further submission, of 2 April 2002, he submits that he does not request the Committee to make determinations of fact on this evidence but provides it only to refute the material provided by the State party.

(16) The author provides the decision which states that: "The Board was sympathetic to his position of having had a long-term relationship with the late veteran". It then sets out the relevant provisions of the VEA relating to the definition of a dependant and states "under the current legislation the Board is required to affirm the decision under review in relation to the status of the applicant."

(17) The author provides his own summary of some Defence Department policies on recognition of same sex relationships.

(18) The State party provides copies of sections 25 and 43 of the Administrative Appeals Tribunal Act 1975, which describes the functions of the AAT.

(19) *Barzhig v. France*, *supra*.

(20) *Toonen v. Australia*, *supra*.

(21) *Danning v. the Netherlands*, *supra*.

(22) *Toonen v. Australia*, Communication No. 488/1992, Views adopted on 4 April 1994.

(23) *Id.*, paragraph 6.2

(24) *Id.*, paragraph 3.1(a).

(25) Mr. Young stated that he was the companion of Mr. C for 38 years, beginning in 1960. Mr. C served in the Australian armed forces for a period of three years, during World War Two. The commission hearing officer expressed "regret that I am unable to exercise any discretion in this matter." *Id.*, paragraph 2.2.