

Assessing the Harms of Noncompliance with the International Covenant on Civil and Political Rights' Protections of Sexual Minorities

July 13, 2006



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Introduction

On July 17-18, a delegation from the United States Department of State will meet with the United Nations Human Rights Committee (“HRC”) in Geneva, Switzerland, to discuss the United States’ compliance with the International Covenant on Civil and Political Rights (“ICCPR”). This report draws from the Williams Institute’s empirical research to assess the effects that the United States’ noncompliance has on sexual minorities.

The HRC is a body of 18 independent experts that interprets the ICCPR and monitors state parties’ compliance with the treaty. The HRC’s interpretations of the ICCPR are not binding, but are highly persuasive and respected by the international community.¹

The United States is noncompliant with the ICCPR’s antidiscrimination provision, as it has been interpreted by the HRC to protect sexual minorities. The United States is noncompliant in at least four regards: (1) the United States has failed to enact countrywide legislation to proscribe discrimination on the ground of sexual orientation; (2) the government refuses to investigate federal civilian employees’ complaints of sexual orientation discrimination; (3) the government bars openly gay, lesbian, and bisexual individuals from serving in the armed forces; and (4) the federal government fails to offer same-sex couples any form of partnership recognition.

¹ See, e.g., Martin S. Flaherty, *Rights, Reality, and Utopia*, 72 *FORDHAM L. REV.* 1789, 1801 (2004) (describing the HRC as having “significant persuasive influence on states”); Johanna E. Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 *EMORY L. J.* 71, 87 n.56 (2003) (describing HRC opinions as “highly persuasive”); Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-cultural “Sensitivity”*, 22 *MICH. J. INT’L L.* 283, 293 (2001) (describing the HRC’s views as “highly persuasive”).

Legal Background: The ICCPR Proscribes Sexual Orientation Discrimination

The HRC has repeatedly stated that Article 26 of the ICCPR proscribes sexual orientation discrimination.² Although Article 26 does not explicitly refer to sexual orientation, the HRC has stated that the Article's explicit proscription of sex discrimination subsumes proscription of sexual orientation discrimination. The HRC first articulated this rule in *Toonen v. Australia*, in which the HRC held that Tasmania's sodomy law violated the ICCPR.³ The HRC affirmed that Article 26 proscribes sexual orientation discrimination in *Young v. Australia*, finding that Australia violated the ICCPR when it treated unmarried opposite-sex couples and same-sex couples differently for the purposes of government pensions.⁴

In *Joslin v. New Zealand*, the HRC held that the ICCPR does not require state parties to recognize same-sex marriage.⁵ However, two concurring HRC members clarified that, if state parties limit marriage to opposite-sex couples, those states may be required to extend rights and benefits of marriage to same-sex couples under a separate regime.⁶

In monitoring state parties' compliance with the ICCPR, the HRC looks to whether states have actively combated sexual orientation discrimination. For example, in recent years, the HRC has chastised Poland and Namibia for lacking legislation that specifically proscribes sexual orientation discrimination.⁷ Conversely, the HRC has praised state parties, such as Greece and Slovakia, which have enacted such legislation.⁸

² 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."

³ In *Toonen v. Australia*, the HRC held that Tasmania's sodomy law violated the ICCPR because it infringed the privacy protection of Article 17 *juncto* Article 2(1). Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), at ¶ 11. However, the HRC also stated that discrimination on the ground of sexual orientation constitutes discrimination on the ground of sex, thus implicating Article 26. *See id.* at ¶ 8.7 ("in [the HRC's] view the reference to 'sex' in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation").

⁴ *Young v. Australia*, Comm. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003), at ¶ 10.4 ("The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation. . . . 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.")

⁵ *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (2002), at ¶ 8.3 ("In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the [ICCPR]").

⁶ *Id.* at Appendix (Lallah and Scheinin concurring). *See also infra* note 27 and accompanying text.

⁷ *See Concluding Observations of the Human Rights Committee: Poland*, U.N. Doc. CCPR/CO/82/POL (2004), at ¶ 18 ("The Committee is concerned that the right of sexual minorities not to be discriminated against is not fully recognized. . . . Discrimination on the ground of sexual orientation should be specifically prohibited in Polish law."); *Concluding Observations of the Human Rights Committee: Namibia*, U.N. Doc. CCPR/CO/81/NAM (2004), at ¶ 22 ("The State party should consider, while enacting anti-discrimination legislation, introducing the prohibition of discrimination on grounds of sexual orientation.")

⁸ *See Concluding Observations of the Human Rights Committee: Greece*, U.N. Doc. CCPR/CO/83/GRC (2005), at ¶ 5 ("The Committee welcomes the recent adoption by Parliament of a law on the implementation of the principle of equal treatment irrespective of . . . sexual orientation."); *Concluding Observations of the Human Rights Committee: Slovakia*, U.N. Doc. CCPR/CO/78/SVK (2003), at ¶ 4 ("The Committee welcomes progress made in various areas . . .")

The United States' Noncompliance and the Magnitude of its Harm

Failure to enact ENDA

The federal government lacks any legislation that specifically proscribes sexual orientation discrimination.⁹ The absence of such legislation is evidence of the United States' noncompliance with the ICCPR.¹⁰ A pending Congressional bill—the Employment Non-Discrimination Act (“ENDA”)—would specifically ban sexual orientation discrimination in the workplace; however, the bill has been pending since 1994 and, moreover, the current administration has failed to publicly support the bill.¹¹ By passing ENDA, the United States would catch up with its peer jurisdictions such as Canada, Australia, New Zealand, and the European Union.¹²

Two studies conducted by Williams Institute faculty members illustrate the harms associated with the United States' lack of sexual orientation antidiscrimination legislation. First, in *Money, Myths, and Change*, Professor M. V. Lee Badgett uses empirical data to show that gays and lesbians suffer economic harms due to sexual orientation discrimination.¹³ She concludes:

All sorts of evidence, from anecdotal accounts and surveys to income studies, clearly demonstrates that workplace discrimination [on the basis of sexual orientation] is alive and well. . . . The expected harm from discrimination is also evident: gay and bisexual men earn from 17 percent to 28 percent less than similarly qualified heterosexual men (from a range of studies), and while the average lesbian's and bisexual woman's earnings appear to be no lower than those of comparable heterosexual women, lesbians are vulnerable to job and income loss from discrimination.¹⁴

. [such as] the amendment of the labour code to include non-discrimination principles, including in the area of sexual orientation”).

⁹ Although the United States lacks federal antidiscrimination legislation covering sexual orientation, sixteen states and numerous municipalities in the United States have local antidiscrimination laws that cover sexual orientation. For more information on these local laws, see Human Rights Campaign, *The State of the Workplace for Gay, Lesbian, Bisexual, and Transgender Americans* 27-28 (2004).

¹⁰ See *supra* notes 7-8 and accompanying text.

¹¹ For background on ENDA, see generally William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 69-72 (2002), available at <http://www.law.ucla.edu/williamsinstitute/programs/dogayrightslawsmatter.pdf> (last visited July 11, 2006).

¹² Canada proscribes sexual orientation discrimination in the Canadian Human Rights Act, Revised Statutes of Canada, ch. H-6, §§ 2, 3(1), available at <http://lois.justice.gc.ca/en/h-6/243963.html> (last visited July 11, 2006). Australia proscribes sexual orientation discrimination in the Australian Workplace Relations Act of 1996 § 170CK(2)(f), cited in J. Michael Kirby, *Law and Sexuality: The Contrasting Case of Australia*, 12 STAN. L. & POL'Y REV. 103, 107 n.60 (2001). New Zealand proscribes sexual orientation discrimination in the New Zealand Human Rights Act § 21, available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes (last visited July 11, 2006). In the European Union, the European Council issued a directive in 2000, instructing member states to prohibit employment discrimination on the ground of sexual orientation. See European Council Directive 2000/78/EC, printed in the Official Journal of the European Union [2000], series L, issue 303, at 16.

¹³ Badgett both reviews existing literature and offers findings from her original analyses. See M. V. Lee Badgett, *MONEY, MYTHS AND CHANGE* (Univ. Chicago 2001)

¹⁴ *Id.* at 45-46.

In addition to discussing the economic harms of discrimination, Badgett also discusses the dignitary harms caused by the pressure on sexual minorities to conceal their sexual orientation at work.¹⁵

In a second Williams Institute project, Professor William Rubenstein analyzes data on employment discrimination complaints.¹⁶ His findings show that complaints of sexual orientation discrimination per gay worker are roughly equivalent to, if not slightly higher than, the number of sex-based discrimination complaints by female workers.¹⁷ Rubenstein's research shows that complaints of sexual orientation discrimination are not negligible; in fact, they are at least as quantitatively significant as complaints of sex discrimination.

Failure to protect federal civilian employees from sexual orientation discrimination

Not only has the United States failed to pass legislation to proscribe sexual orientation discrimination in private sector employment, the federal government fails to protect its own civilian employees from sexual orientation discrimination. The Office of Special Counsel is charged with investigating federal civilian employees' claims of sexual orientation discrimination and enforcing protections against such discrimination. However, the head of the Office of Special Counsel, Scott Bloch, has flatly refused to enforce protections against sexual orientation discrimination.¹⁸ The Office of Special Counsel's refusal to remedy incidents of sexual orientation discrimination violates Article 26 of the ICCPR.

Sexual orientation discrimination in the armed forces

The United States' "Don't Ask, Don't Tell" ("DADT") policy bans openly gay, lesbian, and bisexual individuals from serving in the armed forces.¹⁹ This disparate treatment between heterosexuals and sexual minorities violates Article 26 of the ICCPR. It also violates the protections of privacy enshrined in Article 17 of the ICCPR.²⁰ Notably, most of the United States' major allies do not discriminate against sexual minorities in the armed forces. Those allies include the United Kingdom, Canada, and every other member of NATO except Turkey, as well as Australia, New Zealand, Israel, Japan, and Taiwan.²¹

¹⁵ *Id.* at 51-73.

¹⁶ Rubenstein's study was based on complaint data from the District of Columbia and nine states that proscribed both sex and sexual orientation discrimination at the time of the study; those states were California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, and Wisconsin. See Rubenstein, *supra* note 11, at 69, 76.

¹⁷ *Id.* at 68.

¹⁸ See, e.g., Emily Heil, *The Language of Bias*, THE ADVOCATE, Apr. 25, 2006 (describing Scott Bloch's discriminatory position against sexual minorities); US Federal News, *Lawmakers Urge President to Enforce Ban on Sexual Orientation Discrimination in Federal Workforce*, June 20, 2005 (same); Human Rights Campaign, <http://www.hrcactioncenter.org/ct/Y11111110RXO/> (last visited July 11, 2006) (same).

¹⁹ Pub. L. No. 103-160, 107 Stat. 1547 (1993), codified at 10 U.S.C. § 654 (2000).

²⁰ *Compare Lustig-Prean v. United Kingdom*, (1999) 29 E.H.R.R. 548 at ¶ 64 (Eur. Ct. Hum. Rts.) (stating that discharging a servicemember from the military on the sole basis of sexual orientation violated the protection of private life in Article 8 of the European Convention on Human Rights).

²¹ Christopher Wolf, *Stop Hunting Gay Troops*, LEGAL TIMES, Jan. 10, 2005, available at Center for the Study of Sexual Minorities in the Military, http://www.gaymilitary.ucsb.edu/PressClips/05_0110_LegalTimes.htm (last visited July 11, 2006); Center for the Study of Sexual Minorities in the Military, *Asia's Silence on Gays in the*

Williams Institute Senior Fellow, Gary Gates, relied on Census data to estimate how DADT affects enrollment in the armed forces. Gates estimates that nearly 41,000 additional²² gay men would join the military if the government lifted DADT.²³ This figure illustrates the magnitude of DADT's discriminatory effects.

Failure to offer same-sex couples any form of partnership recognition

In 1996, Congress passed the Defense of Marriage Act ("DOMA"),²⁴ which defined marriage, for the purposes of federal law, as "only a legal union between one man and one woman as husband and wife."²⁵ DOMA, in and of itself, does not violate the ICCPR as it is interpreted by the HRC. The HRC asserted in *Joslin v. New Zealand* that state parties may limit marriage to opposite-sex couples.²⁶

In *Joslin*, the unanimous HRC opinion focused narrowly on marriage itself and was silent on how the ICCPR affects the rights and benefits that are incidental to marriage. However, two HRC members took it upon themselves to clarify in a concurring opinion that state parties must generally offer same-sex couples the rights and benefits that are incidental to marriage. Unless a state party's laws allow for "recogni[tion of] same-sex partnership with consequences similar to or identical with those of marriage . . . [the] denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria."²⁷ As the only statement from HRC members on how the ICCPR affects the rights and benefits incidental to marriage, the concurring opinion in *Joslin* is instructive.

To date, the federal government has not offered same-sex couples *any* rights or benefits that are "similar to or identical with those of marriage."²⁸ Furthermore, with regard to marriage benefits, the government's reasons for differentiating between opposite-sex and same-sex couples are suspect. The House Report for DOMA explains that DOMA was necessary partly because, "[f]or most Americans, there is to this issue of marriage an overtly moral or religious

Military Broken by Taiwan, May 15, 2002 (press release), available at http://www.gaymilitary.ucsb.edu/PressCenter/press_rel020515.htm (last visited July 11, 2006).

²² Some gay men already serve in the military by concealing their sexual orientation.

²³ Williams Institute, *Williams Project's Gary Gates Estimates Impact of U.S. Armed Forces Lifting "Don't Ask/Don't Tell" Policy* (Press Release), Aug. 4, 2005, available at <http://www.law.ucla.edu/williamsinstitute/press/PressReleases/ImpactOfLiftingDontAskDontTell.html> (last visited July 11, 2006).

²⁴ Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000).

²⁵ 1 U.S.C. § 7.

²⁶ See *Joslin v. New Zealand*, Comm. No. 902/1999, U.N. Doc. CCPR/C/75/D/902/1999 (2002), at ¶ 8.3 ("In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the [ICCPR]").

²⁷ *Id.* at Appendix (Lallah and Scheinin concurring).

²⁸ Federal agencies even refuse to extend the incidents of marriage to same-sex partners who are parties to civil unions under state law. See, e.g., *Letter from Robert A. Berkovsky, Branch Chief, Office of Associate Chief Counsel for Income Tax and Accounting* (Dec. 31, 2001), available at 2001 WL 34070608 (explaining that same-sex partners who are parties to civil unions do not have the right to file joint tax returns).

aspect that cannot be divorced from the practicalities.”²⁹ The report then explained that heterosexual marriage better comports with Judeo-Christian norms, citing a study that found that “the Jewish and Christian traditions have, in a clear and sustained manner, judged homosexual behavior to be morally wrong.”³⁰ Such invocation of morality is suspect because the HRC has suggested that state parties should not invoke local moral culture to regulate homosexual behavior.³¹

Two Williams Institute reports highlight the magnitude of harm resulting from the United States’ failure to offer same-sex couples any legal recognition. First, *Same-sex Couples and Same-sex Couples Raising Children: Data from Census 2000*,³² by R. Bradley Sears, Gary Gates, and Bill Rubenstein, suggests that a large number of Americans are disadvantaged by the United States’ failure to offer any partnership rights to same-sex couples. Based on Census data, the report estimates that 4 to 6 million adults in the United States self-identify as gay or lesbian, and that 594,000 householders identify as living with an unmarried same-sex partner.³³ Furthermore, more than 39% of same-sex couples in the United States aged 22-55 are raising children together; they are raising over 250,000 children under the age of 18.³⁴ Finally, the report suggests that cohabiting same-sex couples depend on each other in ways similar to married opposite-sex couples.³⁵ Same-sex couples are disadvantaged when the government treats the two similar types of relationships—same-sex and opposite-sex couples—differently.

Second, in his report, *Bi-national Same-sex Unmarried Partners in Census 2000: A Demographic Portrait*, Gary Gates estimates that 8,500 Americans would seek immigration rights for their non-citizen same-sex partners if the United States offered same-sex couples immigration rights that are similar to those already enjoyed by married couples.³⁶ With regard to immigration policy, Gates’ estimate highlights the magnitude of harm suffered by same-sex couples because the federal government does not offer them any of the rights and benefits that are incidental to marriage. The United States stands in contrast to Australia, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Iceland, Israel, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, and the United Kingdom—all of which allow individuals to sponsor same-sex partners for immigration rights.³⁷

²⁹ H.R. Rep. No. 104-664, 104th Cong., 2d Sess. at 15 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2919.

³⁰ *Id.* at 16 n.54.

³¹ See *Toonen* at ¶ 8.6 (in discussing a sodomy law, stating that the HRC “cannot accept that for the purposes of article 17 of the Covenant, moral issues are exclusively a matter of domestic concern”).

³² R. Bradley Sears, Gary Gates, and Bill Rubenstein, *Same-sex Couples and Same-sex Couples Raising Children: Data from Census 2000* (Williams Institute Policy Report, Sept. 2005), available at <http://www.law.ucla.edu/williamsinstitute/publications/USReport.pdf> (last visited July 11, 2006).

³³ *Id.* at 1, 4-5.

³⁴ *Id.* at 2, 11.

³⁵ *Id.* at 1, 9-10. To measure interdependence, the authors examine factors such as couples’ financial dynamics, child-rearing status, and inclusion of a disabled partner. See *id.* at 9.

³⁶ Gary Gates, *Bi-national Same-sex Unmarried Partners in Census 2000: A Demographic Portrait* 17 (Williams Institute Policy Report, Oct. 2005), available at http://www.law.ucla.edu/williamsinstitute/publications/Binational_Report.pdf (last visited July 11, 2006).

³⁷ Human Rights Watch, *Family, Unvalued: Discrimination, Denial, and the Fate of Binational Same-Sex Couples under U.S. Law*, at Appendix B (2006), available at <http://hrw.org/reports/2006/us0506/index.htm> (last visited July 11, 2006).