香港立法會民政事務委員會
研究性傾向歧視問題小組委員會

意見書

民政事務局在提交研究性傾向歧視問題委員會的文件(CB(2)981/00-01(01))中，雖然開宗明義的指出政府反對任何形式的歧視(第 23 段)，但是，從政府決策部門的文件中，卻可見性傾向歧視的痕跡處處。筆者將先檢視其中數個堅持性傾向歧視的政策，並嘗試指出其中謬誤；然後作出兩項建議。

- *房屋政策 / 婚姻法的性傾向歧視問題*

房屋局及房屋署在文件(CB(2)2003/00-01(01))中指出，「在申請公屋方面，爲免有人提出一些不能容易和客觀地核實的聲稱，當局並不承認『事實上的婚姻關係』和同居關係。(第 3 段)」基於這政策，「鑑於同性戀伴侶無法出示結婚證書證明他 / 她們的婚姻關係，房屋署不會給予他 / 她們家庭組別的申請公屋資格。(第 4 段)」但是，若果中國內地可設定機制確定非法婚外同居，爲何香港政府不可以核實同居關係呢？中國內地和香港兩地法制的不同會對此政策有何影響嗎？其實，房屋署早應確立一個審查婚姻關係的機制 -- 藉(假)結婚來獲取「家庭組別申請公屋資格」的情況不存在嗎？因爲香港法律根本不承認同性婚姻，所以房屋署便認爲「同性戀伴侶無法出示結婚證書」。但如果他 / 她們取得合法海外註冊伴侶(Registered Domestic Partnership)或結婚証書，署方又會不會給予他 / 她們家庭組別的申請公屋資格呢？比方說，一名香港男居民和另一丹麥男公民在丹麥登記作合法伴侶，然後回港申請公屋，房屋署又會如何處理呢？

文件第 6 段點出了香港房屋政策的背後理念：「公屋政策貫徹了政府的婚姻政策。政府的婚姻政策反映了本港社會對一夫一妻制的共識，以及直至目前爲止仍未確認或證明『同性戀婚姻』爲有效婚姻。」然而，假如「本港社會對一夫一妻制的共識」真的存在的話，爲什麼「包二奶」「婚外情」「夫妻暴力」等破壞「一夫一妻制」的問題會無日無之日益嚴重呢？爲什麼離婚數字屢創新高？爲什麼仍有同性伴侶要求法律確認？原因很簡單，因爲這個「一夫一妻制的共識」根本就是一個自欺欺人的異性愛霸權製作。社會爲了成就這假象，唯有對另類感情組合的訴求視而不見 -- 禁止同性伴侶組織家庭就是一明顯例子。

香港可以藉製定「伴侶法」或修改現行的婚姻法來確認同性伴侶的法律地位。事實上，海外已有多個國家(如丹麥、挪威、法國及德國)通過「伴侶法」，而荷蘭和比利時也陸續容許同性婚姻(詳見 GayLawNet ；網址：http://www.gaylawnet.com)。不容否認，按「伴侶法」註冊的同性伴侶的權利普

遍和異性夫妻不一樣 -- 他 / 她們不可在教會註冊，不可領養孩子甚至不可藉人工生殖技術生有下一代。可是，就香港的情況而言，製定「伴侶法」又比修訂婚姻法簡單 -- 要令婚姻法承認同性伴侶，不單只要取消法律對配偶性別的限制，還必須重新釐定「亂倫」、「圓房」、「夫妻」與「通姦」等法律定義，所費時間甚長。故此，我建議香港可先通過「伴侶法」，然後才研究修改婚姻法。

- *捐血指引的歧視*

衛生福利局在文件 CB(2)1297/00-01(3) 中引經據典，企圖爲「禁止與男性有性行爲的男性捐血的政策」辯護：「聯合國愛滋病規劃署有 2000 年 5 月……提到，男性之間的性行爲通常牽涉肛交，進行此類性行爲的人士受到愛滋病病毒感染的風險都相當高(第 1 段)」；「一項在 1990 至 1996 年進行有關希臘性病患者感染愛滋病病毒及相關的感染因素研究……發現，男同性戀者和雙性戀者感染愛滋病病毒的整體比率最高……另一項在美國進行的研究……亦發現，與其他男性有性行爲的年輕男性感染到愛滋病病毒的機會很高。(第 2 段)」

我們必須明白學術研究不是聖經。每個研究的設計、執行及結果詮釋均受主觀價值判斷影響。美國大學亦有研究證明白種人比黃種人優勝，男性比女性聰明；難道我們也無條件接受這些學術結論嗎？簡言之，我們和衛生福利局在採納文件提到的三項報告前，也應細心審視它們的研究前設、計劃執行及結果分析。

讓我們先檢閱聯合國的報告。假設進行肛交會引至受到愛滋病病毒感染的風險提高，那麼所有曾肛交的男女均應被禁止捐血；若果只是男肛交者感染愛滋病病毒的機會較高，則只應禁止男肛交者捐血，而不是禁止所有與男性有性行爲的男性捐血 -- 難道性行爲只有肛交一項？把(男同性)性行爲還原約化成肛交 / 插入，根本就是男性主導異性愛宰制的自我投射，以爲(陽具)插入(陰道)(射精)才是性交。這種思想引致(香港)法律以爲只有「陽具插入陰道」的行爲才算強姦，認爲女同性性行爲不存在(參見保安局文件 SCR 2/2801/83，第 18 段)。其實，正如周華山在〈香港同志故事〉(香港：香港同志研究社，1996)中所述，只有少於 1% 的香港男同志喜愛肛交(附件 1)，其他(男同性)性行爲還包括愛撫、口交及互相手淫。由此看來，聯合國的報告根本就不是毫無問題。

再細看文件提及的另外兩份研究報告。1999 年 4 月 28 日，加拿大資深愛滋病醫生李大爲給香港紅十字會寫了一份意見書(詳見附件 2 。亦請參見陳諾爾(編)(2001)〈歧視個案專題研討 -- 香港紅十字會捐血者須知〉香港：香港彩虹、彩虹行動及現象研究室。頁 32)當中，他指明：感染愛滋病病毒的高危族群是進行不安全性行爲的人，而不是與男性有性行爲的男性。換言之，感染愛滋病病毒的機會高與低，全由個人行爲(共用針筒或進行不安全性行爲)決定，和個人性傾向絕對無關。這是清晰不過的醫學事實，衛生福利局和香港紅十字會卻偏偏對此視而不見，並選擇相信那些暗暗硬把男同性性行爲(不單肛交)等同爲不安全性行

爲的研究報告,背後的原因還不是性傾向歧視？真的希望衛生福利局和香港紅十字會可以公開並清楚地回答以下問題:一位不進行安全性行爲的直人或一位進行安全性行爲的男同志，那個較易感染愛滋病病毒？

假如紅十字會「禁止與男性有性行爲的男性捐血的政策」缺乏無可置疑的醫學論據，而又容許與男性有性行爲的「女子」捐血，則它可能已抵觸了《性別歧視條例》(第 6 和第 7 條)。其實，平等機會委員會及受紅十字會歧視的人也可依 MacDonald v. Ministry of Defence [2000] IRIR 748 一案的判決起訴紅十字會。該案裁定《性別歧視法例》也適用於涉及性傾向歧視的案件，並指英國皇家空軍非法辭退一名同性愛軍官。易言之，這判例把「性別身份」(Sexual identity)收入「性別」(Sex)一詞的涵義之內(附件 3)。雖然此案只是「勞資上訴審裁處」(Employment Appeals Tribunal)的決定，不及上訴庭上議院的判詞般具權威，但判詞邏輯既然言之成理，我們又何妨嘗試引用呢？

- *立法反性傾向歧視不可行？*

民政事務局文件 CB(2)981/00-01(01)第 12 段指出，立法禁止性傾向歧視須「配合社會整體氣候才可有效地進行。但當社會已接納多元性傾向時，我們還需要立法反性傾向歧視嗎？任何反歧視立法都是爲了保護弱勢社群,和主流大眾抗衡的工具機制；要求社會大多數同意創造一套制約自己的法律，簡直是緣木求魚。必須注意:法律是誰護的不是多數人的暢快心情,而是正義的理念理想。(參見 Litowitz, Douglas(1997) *Postmodern Philosophy and Law* USA: University Press of Kansas)立法若只是追隨主流意見，民主暴力就會出現。政府在反性傾向歧視立法的立場就是一例：一方面高呼反對性傾向歧視，一方面又借民意反對立法。這不就是爲了討好主流大眾犧牲正確思想的活生生例子嗎？始終不明白，爲何在政府眼中，法律不可以成爲教育大眾認識禁止性傾向歧視的工具？由 1991 年《人權法案條例》通過至今短短十年內，市民大眾對新界原居民特權、教育署不公平派位的大聲討伐大力鞭撻,這不就顯示了法律對香港社會平權人權的意識大大提高有正面作用的好例子嗎？

- *刑事法的性傾向歧視*

現時《刑事罪行條例》(香港法律第 200 章)對和男子肛交的未成年男子和未成年女子的處理並不一樣 -- 前者須負刑事責任，後者卻不用。第 118C 條列明：

> 任何男子—
> (a) 與年齡在 21 歲以下的男子作出肛交；或
> (b) 年齡在 21 歲以下，而與另一名男子作出肛交，
> 即屬犯罪，一經循公訴程序定罪，可處終身監禁。

第 118D 條則這樣寫：

> 任何男子與年齡在 21 歲以下的女童作出肛交，即屬犯罪，一經循公訴程序定罪，可處終身監禁。

保安局在文件 CB(2)1297/00-01(02)中這樣解釋其中差異：「對待方法不同，是基於社會人士同意有必要保護婦女免被利用從事性罪行和敗壞行徑所傷害。(第 2 段)」問題是：爲什麼法律不用保護與男子肛交的未成年男子？是因爲願意和男子肛交的男子都是次等公民嗎？爲什麼肛交又會與「性罪行和敗壞行徑」有必然關係呢？正因爲法律認爲肛交是「性罪行和敗壞行徑」的代名詞，所以肛交同意年齡(21 歲)和陰道交的同意年齡(16 歲)不同。

此外，保安局及民政事務局都沒有回應「《刑事罪行條例》第 118 J 條是否有性傾向歧視？」這一問題。該條列明，任何男子與另一男子在公眾地方作出嚴重猥褻作爲，即屬犯罪，可處監禁 2 年。請注意：(a)女子不能此罪行的主犯，(b)而雙方「同意」不能成爲辯護理由。歐洲人權法庭(European Court of Human Rights) 於 2000 年 7 月 31 日裁定，英格蘭同樣的法律條文違反《歐洲人權公約》(European Convention on Human Rights)第 8 條(附件 4)。

- *建議*

1. 進行本地同志文化研究 -- 1980 年，香港殖民地政府第一次詳細研究本土同志文化，距今已有二十一年。其間，同志學術理論高速發展，香港同志文化轉變甚大。1996 年，香港殖民地政府雖進行了一次關於性傾向歧視的研究，但其採用的方法被批評至體無完膚 -- 用民意調查方式來決定應否立法禁止性傾向歧視根本就是矛盾，問卷設計本身更充滿歧視。因此，我建議政府在製定反性傾向歧視政策前，再一次採用學術角度仔細審視本土同志文化在這五分一世紀的轉變，

2. 研究外地 / 本地同志法律 -- 在過去五年，(同性)伴侶法、同性婚姻法及反性傾向歧視的判例紛紛在海外出現。它們產生的環境和對社會的影響都值得我們參考。香港政府更應由同志觀點，詳細分析自身的法律政策。

趙文宗博士
香港城市大學法律學院助理教授

第五章：性生活

（一）肛交的謬思

提起男同性愛，許多人立即聯想到肛交，但以筆者訪問所見，這是極之錯誤的想法。在二百六十五份男同志的問卷裏，六十人從未試過肛交，不大喜歡肛交的有一百廿人，看情況而定的有四十九人，很喜歡肛交的只有二十五人，不及總數十分之一。一位長期泡魚塘的男同志就表示：「現在還有人肛交嗎？那麼老套，不流行嘛，這是後愛滋時期，大家都要扮『政治正確』，安全性行爲嘛，電視廣告也有啦。我想，異性愛夫妻肛交的比率可能還高一點，他們以爲一夫一妻就安全啦，不會染上愛滋啦，於是大部份異性愛夫妻從不注意安全性事，反而同志呢，個個心驚膽跳，誰與你肛交？我與幾十人上過床，喜歡肛交的屈指可數，通常是貪新鮮，玩玩便算。像我，試過兩次便發誓不再被插入，根本不好玩，痛得要命，像剝你的肉、撕你的皮，但聽說有人就是喜歡痛。你問我，我敢說九成男同志不喜歡肛交。女同志嘛，大部份未見過假陽具（dildo），對拳頭交合（fisting）又充滿恐懼，喜歡肛交的，我相信更少，你問她們吧！」

另一位同志說：「異性愛者也一樣肛交，爲甚麼偏偏說同志獨好此道？我愛的是男人，不是肛門。若我搞基是爲了肛交，那倒不如找女人，可以減少許多煩惱了。按我觀察，喜歡肛交的同志佔少數，大多喜歡撫摸、接吻、刺激乳頭、摩擦生殖器、相互手淫和口交，這很平常嘛，與異性愛者分別不大，只欠沒有陰道交合，不會生育而已。我自己最興奮的地帶是乳頭、耳朵，生殖器不是最興奮的，但也喜歡互相撫摸。這樣說其實也沒意思，你可能當了作同性愛者的特色，但其實異性愛者也相若，隨便問個女子，她的敏感地帶也可能是乳頭、耳朵和愛撫。許多愛惡其實都因人異，有同志只喜歡口交，有同志迷戀寬肩膀，異性愛的世界一樣千差萬別。好些報道總愛突出同志的性行爲，彷彿同志是異類人種；我不認爲自己是異類，我有甚麼特別呢？我只是一個普通人，從沒有人看出我是同志，對着鏡子，我也看不出自己是同志。我接受過兩次大專生的訪問，都是例牌問扮男扮女呀、零與壹或肛交的問題呀，還自以爲問得很『到肉』，似乎做足資料搜集，很令人失望。明明我不喜歡肛交，反對零壹之分，但他們總是從這個角度問，無論我怎樣回答也擺脫不了這個框架。我見過同志詳細解釋自己爲何是零號，在甚麼情況下喜歡肛交，正中獵奇者的下懷，令外界對我們越描越黑。」

提起「性」，一位女同志更反問甚麼才是「性行爲」。她說：「按傳統標準，女性不會有性行爲，因爲沒有陽具。金賽研究的性行爲，也是以性高潮爲前提，高潮又以射精爲基礎，那女人可以怎樣呢？你問我的性行爲，我要先問甚麼是性行爲？拖手是不是？接吻是不是？撫摸是不是？插入是不是？爲甚麼只有插入才算是？我從未試過插入，難道我沒有性經驗嗎？我與女友一起住，一起睡覺，會赤裸全身相擁而睡，那不是性經驗嗎？有時我摸她的手，刻意誘惑她，會很興奮，但有時吻她的乳房卻沒有感覺，怎樣界定呢？性經驗是很親密的感覺，很主觀的，怎可以指明是某些行爲那麼機械化？」

另一位同志對「性」也別有見解：「幻想是很重要的，美麗的性事總帶點幻想，純粹的性行爲可能只是機械化動作，只有加入感情，多幾分投入，才美滿。我的性幻想很豐富，也很精彩，可能因爲現實上的性事較平淡。我只有過一個伴侶，她很沉悶，每次做的時候都極之被動，躺下來就期望我『搞掂』。我的性高潮，泰半來

香港同志故事

作　者：周華山
出　版：香港同志研究社
地　址：香港上環南北行大廈 13 樓 A 座
編　輯：陳紅
封面設計：W. Design
製　作：美高製作室
植　字：全佳電腦排版公司
發　行：利源書報社
出版日期：1996 年 1 月初版
I S B N：962-850-264-6
定　價：HK$ 72

序

身份政治

「關心」向來是挺敏感的，尤其是既得利益者對小衆社羣的「關心」。最初很天眞，以爲可以憑藉異性愛者的社會特權，爲同志社羣做點事，問題卻接踵而來，我既不認同異性愛政治體制，也反對用性取向把人劃分爲不同人種，幹嗎要叫自己做「異性愛者」而自打嘴巴？八年前，聽到一位學者主講同性愛，第一句是：「千萬不要誤會，我不是同性愛者！但我很同情他們，我們不應再歧視他們。」自此，我絕少說自己是「異性愛者」，與好朋友一起，根本不需要這標籤，若陌生人問及，我會坦誠分享自身的情慾經歷，或索性說干卿底事。

在英國的日子，讀的是當代女性主義及同志理論，說那是「文化震盪」似乎抽離了一點，「血濃於水」又太陳腔濫調，謂「狂熱」吧。親眼看見同志隨街被「正常男人」毆打，親耳聽到同志神學家講述如何被主流教會封殺，我有點激動，問：我可以做甚麼——很基督教式的使命感。自此生活變得很政治性，很容易動情。

發聲空間

有位學人在一份學術雜誌上說我是「本土同志的代言人」，我不敢想像本地同志會有甚麼感受。「異性愛者」（？）憑甚麼代替同志發聲？於我，學術的動力，統統源於自己的情感生命，至低限度，我在同志的生命和景象裏，看到男人不一定父權，異性愛不事必是霸權，自己如今站在較幸運的社會位置上，讓學術衝擊和改變

李大爲（資深愛滋病醫生）意見書

To: Hong Kong Red Cross.

28th April 1999

Dear Sir/Madam.

As a medical professional actively involved with HIV/AIDS work in Canada. I am writing to support the Allied Front Concerned for the HK Red Cross's request for you to amend your published donor guidelines for blood donation from the public.

I have been a HIV primary care physician for the last ten years and am now the medical director for Canada's first freestanding AIDS hospice. Casey House. which has provided training and consultation to many international communities and AIDS service organizations including "LOOK OUT" from Hong Kong. I am on the Ontario Ministry of Health's Advisory Committee on HIV/AIDS and was the founder of the Asian Community AIDS Services in Canada. Through the years I have worked with many institutions and service organizations including the Toronto Public Health Department and the Canada's National Consensus Group on HIV/AIDS Prevention.

Your existing guidelines as stated are flawed in many ways. AIDS educators and health care providers from all over the world has recognized that the real risk of HIV transmission lies in risky behaviours. not the characteristics of certain individuals. By targeting groups of individuals with certain characteristics. your guideline not only perpetuated negative stereotypes and discrimination against those communities. but also endangers the public's health by giving a false message of safety that is not justified. Any persons engaged in unprotected sex can transmit the HIV virus. whether their sex partner is of the same or opposite sex. A sex trade worker with multiple partner who uses protection at all times is no more at risk than any other persons who engage in unprotected sex frequently. Worse. the customers of sex trade workers (or their spouses) are not at any less risk if they repeatedly engage in unsafe sex.

Not only are the above guidelines flawed and scientifically unfounded. it also alarms me that you failed to recognize that the real safety and protection for the public lies not within the act of discouraging specific groups to give blood. but rather lies in having an effective screening system for ALL blood donated. There have been hard lessons learnt from international communities of Red Cross giving contaminated blood and infecting individuals with HIV and Hepatitis C over the last decade. In fact. the Canadian Government is currently compensating individuals who contracted HIV and Hepatitis C by contaminated blood through transfusions. Targeting perceived "at risk" groups does not fulfill the purpose of protecting the public and does not replace the need for having a universal screening system for all blood donated to your organization.

It is therefore advisable in yours and the Hong Kong public's interest to adopt the recommendations as suggested by the Allied Front of Communities Concerned for the HK Red Cross to revise your donor guidelines. I would further recommend that you take any "timeline" out of your guideline because it does not make any scientific sense; all people who have engaged in risky behaviours are at risk unless screened to be otherwise. This will rectify the misinformation that the existing materials given to the public and more effectively educate the public about what are safe and unsafe behaviours to be engaged in in order to minimize the risk of exposure to the HIV virus.

Respectfully.
Alan Li, M.D. (李大爲)

e-mail: alanli@writeme.com

[2001] IRLR 748

MacDONALD (appellant) v. MINISTRY OF DEFENCE (respondents)

600 *Sex discrimination*
611 *Direct discrimination*
618 *Sexual harassment*
619.1 *Discrimination on grounds of sexual orientation*
1700 *Human rights*
1732.1 *Rights and freedoms – respect for family and private life – private life*
1738 *Principle of non-discrimination*

Sex Discrimination Act 1975 sections: 1(1)(a), 6(2)(b)
European Convention on Human Rights and Fundamental Freedoms: Articles 8, 14
Human Rights Act 1998

The facts:
Mr MacDonald joined the armed forces in 1986 and was subsequently commissioned in the Royal Air Force. When he arranged for a transfer to the Scottish Air Traffic Control Centre (Military), he was subjected to vetting procedures during which he declared that he was homosexual. He also made that declaration to his commanding officer. This admission of homosexuality led to his compulsory termination in March 1997.

Mr MacDonald complained that the termination of his employment by reason of his admitted homosexuality amounted to unlawful discrimination on grounds of sex, and that the questioning to which he was subjected during the vetting process about his sexual activities amounted to sexual harassment.

An employment tribunal dismissed his complaint. The tribunal took the view that it was bound to find that the Sex Discrimination Act, insofar as it refers to "sex", is concerned with gender and not sexual orientation. Therefore, the termination of the applicant's employment did not fall within the scope of the Sex Discrimination Act. The tribunal considered that this conclusion was unaffected by the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom*, in which the Court held that the applicants' right to respect for their private lives under Article 8 of the European Convention on Human Rights was violated by the investigations conducted into their homosexuality and by their discharge from the armed forces pursuant to the policy of the Ministry of Defence. The tribunal noted that the European Court of Justice had human rights issues before it when it considered *Grant v South-West Trains Ltd* and held that discrimination based on sexual orientation did not constitute discrimination based on sex.

The Employment Appeal Tribunal sitting in Edinburgh (Lord Johnston, Dr A H Bridge, Dr W M Speirs) in a reserved decision given on 25 September 2000 allowed the appeal and declared that the appellant was discriminated against on grounds of sex. The case was remitted to the employment tribunal for the assessment of compensation.

The EAT held:
619.1, 1738
The employment tribunal had erred in law in finding that the appellant's dismissal from the armed forces on grounds of his sexual orientation was not on grounds of "sex" within the meaning of the Sex Discrimination Act.

The word "sex" in the Sex Discrimination Act is ambiguous and should be interpreted to include "on grounds of sexual orientation" as well as meaning "gender".

Although the word "sex" has been clearly interpreted by the English courts as being restricted to a gender interpretation and not a sexual orientation interpretation, the opposite interpretation has been put upon the word by the European Court of Human Rights in its interpretation of Article 14 of the European Convention. These decisions have put the focus on an ambiguity in the word "sex" found in both the Sex Discrimination Act and the Convention, that it can refer to homosexuality in both men and women, as well as referring to gender. Since the European Court of Human Rights has expressly included sexual orientation in the definition of the word "sex" as found in the Convention, there is a classic example of a statutory ambiguity.

If United Kingdom domestic legislation is ambiguous in the context of a potential Convention right the interpretation consistent with the Convention should be favoured. On that basis, the EAT would favour the wider interpretation. *Grant v South-West Trains Ltd* did not greatly influence that conclusion since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word "sex".

Since the word "sex" is capable of including sexual orientation, the appropriate comparison for the purpose of the Sex Discrimination Act, if comparators are relevant, is between a male or female homosexual and a female or male heterosexual in order determine not whether one homosexual is being treated less favourably than another, but whether homosexuals of either gender in the context are being treated less favourably than heterosexuals of the opposite gender.

In the present case, therefore, by reason of his dismissal on grounds of his sexual orientation, the appellant was discriminated against in terms of the Sex Discrimination Act.

618, 619.1
The employment tribunal also erred in finding the correct comparator for the purpose of the appellant's claim of sexual harassment in respect of the way in which a vetting interview was conducted was with a female homosexual. The tribunal misdirected itself in not applying a wider definition which would have allowed the appellant's claim of sexual harassment on grounds of sexual orientation. Once it was appropriate to interpret the word "sex" as capable of including sexual orientation, the distinction was between how the employer treated a homosexual, be it male or female on the one hand and a heterosexual, be it female or male on the other.

The correct comparator in the present case was a female heterosexual, and it was nothing to the point that the interviewer would have treated a lesbian female in exactly the same way as a homosexual male. Given the tribunal's findings as to the nature of the interview, the test which applied was that laid down in *Porcelli v Strathclyde Regional Council* which confirmed that if the nature of conduct is both sexually-related and blatantly unacceptable, there is no need for a comparator. On the facts as found therefore, the appellant was subjected to sexual harassment contrary to the Sex Discrimination Act.

Obiter dicta:
1700
It is not clear whether the Human Rights Act applies only to discriminatory acts committed after the operative date of 2 October 2000, or whether it also applies to proceedings pending in relation to dis

Baker v State of Vermont, Vermont Supreme Court, 20 December 1999
Brown v Stott [2000] SLT 879 CS
Grant v South-West Trains Ltd, C-249/96 [1998] IRLR 206 ECJ
Murray v HM Advocate [2000] JC 102 CS
O'Neill v HM Advocate [1999] SLT 958 CS
Pearce v Governing Body of Mayfield Secondary School [2000] IRLR 548 EAT
Porcelli v Strathclyde Regional Council [1986] IRLR 134 CS
Reed and Bull Information Systems Ltd v Stedman [1999] IRLR 299 EAT
R v Director of Public Prosecutions ex parte Kebeline and others [1999] 4 All ER 801 HL
R v Ministry of Defence ex parte Smith [1996] IRLR 100 CA
R v Secretary of State for Defence, ex parte Perkins [1997] IRLR 297 HC
R v Secretary of State for Defence, ex parte Perkins (No.2) [1998] IRLR 508 HC
Salgueiro da Silva Mouta v Portugal, 33290/96, 21 December 1999 ECHR
Smith and Grady v United Kingdom [1999] IRLR 734 ECHR
Smith v Gardner Merchant Ltd [1998] IRLR 510 CA
T, Petitioner [1997] SLT 724 CS
Toonen v Australia [1994] IHRR 97
Vriend v Alberta [1998] 1 SCR 493 Canadian Supreme Court
Webb v EMO Air Cargo (UK) Ltd [1993] IRLR 27 EAT

Appearances:
For the Appellant:
AIDAN O'NEILL QC, instructed by Anderson Strathern
For the Respondents:
IAN TRUSCOTT QC, instructed by Robson MacLean WS

1 LORD JOHNSTON: This is an appeal at the instance of the applicant appellant against a decision of the employment tribunal in respect of his claim that he had been discriminated against unlawfully on grounds of sex, contrary to the Equal Treatment Directive 76/207/EEC and s.6 of the Sex Discrimination Act 1975 ('SDA'). He also had a consequent claim for sexual harassment which raises similar but separate issues. Both claims were dismissed.

2 The appellant is homosexual. He is 35 years of age and was commissioned initially in the Intelligence Corps (Territorial Army) in May 1986. He subsequently enlisted as an officer cadet in the Royal Air Force and was commissioned and subsequently promoted to various posts culminating in a period of service at RAF Aldergrove. He then arranged for a transfer to the Scottish Air Traffic Control Centre (Military) at Prestwick, largely for compassionate reasons to be closer to a relative who was ill. He realised this would involve certain vetting procedures, in the course of which he was asked to declare whether he was a homosexual, to which he agreed. He subsequently also made that declaration to his commanding officer. These declarations led eventually to his compulsory resignation under Queen's Reg. 2905, his last paid day of service being 27 March 1997.

3 He subsequently made a timeous application to the then industrial tribunal claiming discrimination on the grounds stated and sexual harassment and compensation, which came to a hearing in July and September 1999.

4 The tribunal made a number of findings of detailed fact, not least in relation to the interview conducted in the vetting process by a Wing Commander Leeds which was the basis of the claim for sexual harassment. In that latter respect there were some factual discrepancies disputed before us, the tribunal not being satisfied that the vigorous questioning by the officer in relation to the appellant's sexuality and its content was sexually motivated as far as the Wing Commander was concerned. It considered it was more part of what he perceived to be a strenuous vetting process. Nevertheless, there was little doubt and it was so found that the interview was distressing and distasteful to the appellant. We put that matter aside for the being and turn to the real issue in the case.

5 It was not disputed that the appellant's employment in Royal Air Force was terminated by reason of his admi homosexuality, but the substance of the decision aga him is that the SDA, in so far as it refers to the word 's is concerned with gender and not sexual orientation. admitted reason therefore for the termination of the ap lant's employment does not fall, in the view of the emp ment tribunal, within the scope of discrimination en aged by the 1975 legislation.

6 It has to be noted that the principal argument before tribunal concerned whether or not, there being un tainty in the law as to the proper definition or constr tion to put upon the word 'sex', in the 1975 Act, the bunal should make a reference to the European Cour Justice. It also has to be noted that, subsequent to hearing but prior to the issue of the judgment, the Eu pean Court of Human Rights in Strasbourg issued a ju ment best found as *Smith and Grady v United Kingd* [1999] IRLR 734 in which it held that investigations by Ministry of Defence into the homosexual orientation of two appellants violated their human rights in terms Article 8 of the European Convention on Human Righ The basic facts of this case and its sister case, *Lust Prean and Beckett*, are indistinguishable from the prese case inasmuch that all four applicants in the Strasbou Court were maintaining violation of their human rights terms of the Convention by reason of being dismissed fr the Services as a consequence of being homosexual, terms of the policy then adopted by the Ministry Defence which was to the effect that homosexuality incompatible with service in the armed forces and th persons who were known to be homosexual and to enga in homosexual activity are administratively discharg from the armed forces. The European Court of Hum Rights upheld their contention, with the result that su sequent to the hearing in this case before the tribun below, for the first time the European Court of Hum Rights has interpreted the Convention so as to protect t rights of homosexuals, albeit under the right to priva

7 The operative part of the tribunal's judgment in relati to this general question is to be found on p.22 of their dec sion as follows:

> 'The tribunal recognises that the decision of the Eur pean Court of Human Rights in *Smith and Grady* (an indeed the related case of *Lustig-Prean and Beckett* Applications Nos 31417 and 32377/96) represent a si nificant landmark in the campaign of those seeking th elimination of the Services' policy on homosexuality. Th tribunal understands that in the light of the rulings b the European Court of Human Rights the UK Goverr ment has suspended all action against homosexuals fa ing dismissal from the forces. Apart from any other cor sideration, the rulings will have particular significanc in the United Kingdom when the Human Rights A 1998 comes into force in October 2000. In the context this case the rulings do no more than establish that th treatment of the applicants breached rights embodie in the Convention. Those rights existed prior to the ru ings. They existed at the time of the ECJ decision i *Grant*. While therefore the tribunal recognises that th rulings of the European Court of Human Rights repre sent a significant advance in the overall cause of per sons such as the applicant in the present case, it doe not find that they advance in any way the argumen that the tribunal should make a reference of the kin which it is being asked to make.
>
> In any event, the ECJ did have in consideratio "human rights issues" when it made the decision i *Grant*. As noted above, Mr O'Neill quoted at length fro the judgment of the ECJ in *Grant* in an effort to illus trate the extent to which the Court drew from the cas law of the European Court of Human Rights. In *Gran* having summarised the case before it the Cour observed (paragraph 24, p.21 S:

"In the light of all the material in the case, the first question to answer is whether a condition in the regulations of an undertaking such as that in issue in the main proceedings constitutes discrimination based directly on the sex of the worker. If it does not, the next point to examine will be whether Community law requires that stable relationships between two persons of the same sex should be regarded by all employers as equivalent to marriages or stable relationships outside marriage between two persons of opposite sex. Finally, it will have to be considered whether discrimination based on sexual orientation constitutes discrimination based on the sex of the worker."

The passages (paragraphs 29–35, p.218) quoted by Mr O'Neill in his supplementary submissions represent the Court's observations on the second of the three questions identified by it in paragraph 24 of its judgment. It is the third of the three questions set out there which principally concerns this tribunal. The tribunal notes that when it came to deal with this question the ECJ recorded a submission made by Miss Grant that the Community provisions on equal treatment of men and women should be interpreted as covering discrimination based on sexual orientation. She referred the Court in particular to the International Covenant on Civil and Political Rights of 19 December 1966 (United Nations Treaty Series, vol. 999, p.171) in which, in the view of the Human Rights Committee established under Article 28 of the Covenant, the term 'sex' is to be taken as including sexual orientation. Having noted that submission the ECJ made these observations (paragraphs 44 and 45, p.219):

"The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law (see, for example, case 374/87 *Orkem v Commission* [1989] ECR 3283, paragraph 31, and joined cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] ECR I–3763, paragraph 68).

However, although respect for the fundamental rights, which forms an integral part of those general principles of law, is a condition of the legality of Community acts, those rights cannot in themselves, have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 [1996] ECR I–1759, paragraphs 34 and 35)."

It appears to the tribunal that what the Court said about fundamental rights being incapable in themselves of having the effect of extending the scope of the Treaty provisions beyond the competences of the Community effectively answers Mr O'Neill's argument on the "human rights issues". This ties in with what the ECJ said later in *Grant* about the provision in the Treaty of Amsterdam for the insertion into the EC Treaty of an article which will allow the council to take appropriate action to eliminate, among other forms of discrimination, discrimination based on sexual orientation. As Lightman J said in *Perkins No.2* (paragraph 10, p.510):

"It is a matter for the council to make this extension in Community rights, not the ECJ."

In short the tribunal finds itself in no different a position than Lightman J in *Perkins No.2* in dealing with the request that it should make a reference to the ECJ. Having reviewed the authorities and the detailed and careful arguments advanced by Mr O'Neill the tribunal finds that the answer to the question of construction which the proposed reference raises is so obvious as to leave no scope for reasonable doubt. The tribunal does not know whether, as suggested by Mr Truscott, a reference would be met by a letter from the Administrator of the ECJ inviting the tribunal to consider withdrawing the reference. The important point is that the tribunal has no reason to doubt what answer the Court would give to the questions formulated in Mr O'Neill's supplemental submissions were it to address them. For that reason the tribunal has decided not to make the reference. Further it has decided that in the light of the authorities on the interpretation of both the Directive and the SDA the applicant's complaint of sex discrimination in respect of his enforced discharge from the Royal Air Force falls to be dismissed.'

8 That part of the judgment has to be looked at against the background of other decisions of the English court and the European Court as follows:

R v Ministry of Defence ex parte Smith & Grady [1996] IRLR 100

R v Secretary of State for Defence ex parte Perkins [1997] IRLR 297

R v Secretary of State for Defence ex parte Perkins [1998] IRLR 508

Smith v Gardner Merchant Ltd [1998] IRLR 510

Grant v South-West Trains Ltd [1998] IRLR 206.

9 With the exception of the latter case, these cases were decisions of the English courts determining, irrespective of issues under the Convention, that the relevant discrimination as to sex in relation to EEC legislation, was that between male and female ie an issue of gender. Thus it can be seen that the substance of the decision of the tribunal below in refusing a reference was that the matter had been clearly interpreted and an answer to a reference was obvious and that any claim for discrimination under the SDA or indeed the Equal Treatment Directive, restricted to, or related to, discrimination as between male and a female and not based on sexual orientation or persons of the same sex or because of their sexual orientation.

10 Although the tribunal below had knowledge of the existence of *Smith and Grady* before issuing its decision, it seems it did not appear to consider that such bore upon the content of it (see p.22 of the decision).

11 There are two other important issues. At the beginning of October 2000, the Human Rights Act 1998 comes into effect within the United Kingdom general law which requires, essentially, that courts should interpret United Kingdom legislation against the background of, and to be compatible with, the European Convention on Human Rights, and it is against that background that the Ministry of Defence changed their policy and abandoned their prohibition on homosexuality within the Services, notwithstanding the Act has yet to come into force. This tribunal however, is faced with the fact that very shortly after the issue of our judgment, the Convention will be incorporated into United Kingdom law generally, although it has been within the Scottish jurisdiction for over a year. This, it was submitted by Mr O'Neill on behalf of the appellant, was an important factor with regard to the future, inasmuch that he maintained that his client could not in the long term lose, albeit he was losing at the moment. Whatever may be the position under the Human Rights Act, however, we consider we must apply the law at the date of this hearing, which means that we cannot have regard to the possible effect on this case in due course of the Human Rights Act. There was an issue between the parties in this respect that the arrival of this Act will not in any event have any retrospective effect, which means that this particular application will be never be subject to it by reason of the fact that the alleged discriminatory act occurred before the Human Rights Act came into force. As will be seen, we offer no view upon this matter, since it need not be focused for our determination of the issues before us.

12 However, there is one other matter of some importance. We were informed that in *Salgueiro da Silva Mouta v Portugal*, an unreported case of the European Court of Human Rights dated 29 December 1999, that Court has ruled that sexual orientation is contrary to its own discriminatory provision, namely Article 14 of the Convention which uses amongst others the word 'sex' in relation

to discriminatory acts that can be successfully complained against.

13 The current state of the law before us is, therefore, within the United Kingdom, that it has been established by the English courts that the word 'sex' has been clearly interpreted as being restricted to a gender interpretation and not a sexual orientation interpretation while the opposite interpretation has been put upon the word both indirectly in *Smith and Grady* and directly in *Salgueiro* by the European Court of Human Rights. It has to be said that Mr O'Neill made something of a plea ad misericordiam on behalf of his appellant, that if he was sooner or later to win in Strasbourg, it was unreasonable to require him to exhaust his remedies in this country before so doing but again we are unable to accept this as being relevant to the issue before us which must be determined upon its merits at the present time and upon the law that applies at the present time.

14 The substance of Mr O'Neill's submission was that it has been accepted prior to the coming into force of the Act in Scots law, there is a presumption in the common law that the Westminster Parliament intends to legislate in conformity with international commitments including the Convention. Accordingly, when a statutory provision is susceptible of more than one interpretation, the court should give it the construction which complies more closely with these commitments. He referred to Lord President Hope in *T, Petitioner* [1997] SLT 724 at 733–734. A similar approach had been adopted in *O'Neill v HM Advocate* [1999] SLT 958 and now to some extent modified by *Murray v HM Advocate* [2000] JC 102 given that the Convention is part of Scots law in the criminal context. However, Mr O'Neill submitted that, as a matter of common law, statutory interpretation was required to adopt a position compatible with the Convention even prior to the arrival in the national law of the Convention as a matter of law, and he pointed to certain dicta from Lord Hope of Craighead in *R v Director of Public Prosecutions ex parte Kebeline and others* [1999] 4 All ER 801 at 838–839 to the extent of statutory interpretation being generally found to reflect declared fundamental rights and freedoms. Putting aside for the moment any question of ambiguity, he submitted that so long as a national United Kingdom statute was capable in any way of being construed to be compatible with the Convention, that was the line down which the court should go. It was necessary to identify the relevant Convention Right and only if it was impossible to make it compatible with the relevant United Kingdom legislation, was the Convention to be ignored. He then made a number of submissions under reference to certain foreign cases to support the view that this tribunal should interpret the word 'sex' as being compatible with the Convention at least if it included sexual orientation, given the recent decisions to which we have referred of the European Court of Human Rights. He referred to *Toonen v Australia* [1994] IHRR 97, *Vriend v Alberta* [1998] 1 SCR 493, *Baehr v Miike*, an unreported decision of the Supreme Court of State of Hawaii dated 9 December 1999, and *Baker v State of Vermont*, another unreported decision of that State's Supreme Court dated 20 December 1999. The high point of his submission was that only if it was impossible to interpret a relevant piece of legislation in terms of compatibility with the Convention should that not happen. He did, however, return to the issue of ambiguity as focused by Lord Hope in *T, Petitioner*.

15 Mr Truscott, responding on behalf of the respondents, accepted the general factual background, albeit disputing some aspects in relation to the sexual harassment issue, but he maintained that the law of the United Kingdom in conjunction with the European Court of Justice, has clearly stated in a number of authoritative cases both in relation to equal treatment and equal pay and thus sex discrimination, that it applied only to gender circumstances and not to sexual orientation as between the same sex or in relation to the same sex. There was no room, he said, for an ambiguity argument nor should the Convention be applied at all, at least so long as the Human Rights Act was not in force. This was particularly clear from *Perkins No.2*, supra, and a recent decision of the Employment Appeal Tribunal in England, *Pearce v Governing Body of Mayfield Secondary School* [2000] IRLR 5[illegible] where the Employment Appeal Tribunal confirmed a decision of the employment tribunal that, when the acts complained of were homophobic thus having the result that homosexuals being treated the same, there was no discrimination on grounds of sex, the issue not being one gender, there being no suggestion that male and female homosexuals were being treated in a different way. That said Mr Truscott, the current state of the law clearly and without equivocation excludes sexual orientation from the interpretation to be put on the word 'sex' in the 1975 Act and thus the present application effectively is incompetent. The tribunal thus came to the correct decision. There was, he said, no ambiguity and certainly no scope so long as the Human Rights Act was not in force for the high position adopted by Mr O'Neill on the issue of 'impossibility' and 'compatibility'.

16 1700
There is no doubt that, in seeking to resolve the matter before us, the issue is initially complicated by the imminent arrival of the Human Rights Act into the United Kingdom law in the particular context of employment. It is not necessarily clear to us that after the operative date it applies only to discriminatory acts committed after that date and not also to proceedings pending in relation to discriminatory acts before that date, which was Mr O'Neill's contention. It derives some support from the fact that in the relevant provision which is s.7, reference is made to 'any legal proceedings', in s.7(1)(b). It is also somewhat ironic that if we delayed issuing this judgment until after 2 October 2000, since s.6 applies to a court or tribunal, it would be unlawful for us after that date to act in a way incompatible with the Convention; but that seems to us to beg the question before us.

17 There is also a real issue to be determined in due course as to what interpretation should be put on the provisions of s.3(1) which states:

> 'So far as it is possible to do so primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights.'

18 It can be seen at once that this may well be approaching the position adopted by Mr O'Neill before us, against the background of impossibility, thus requiring the courts to take a view of Convention Rights against United Kingdom legislation similar to that to which they are already enjoined to do in relation to Community legislation by the House of Lords in *Webb v EMO Air Cargo (UK) Ltd* [1993] IRLR 27, per Lord Keith at p.32, (see Lord Hope in *Kebeline*, supra). However that question only arises when the Act has come into force.

19 However, these observations are not to be treated as our views, relevant to the resolution of this matter, having regard to the fact that we consider we can resolve this matter against the current common law as focused by Lord President Hope in *T, Petitioner*, where he disassociates himself from the passages quoted by him, as observations of both Lord Ross and Lord Diplock, that the Convention is currently irrelevant even in a context of ambiguity. The opinion of his Lordship is to the effect that if ambiguity is established inasmuch that one of the possible interpretations is consistent with the Convention and the other not, the former interpretation should be favoured. Furthermore he goes on in the next passage to confirm the legislative presumption applying to United Kingdom law in relation to the Convention to which we note subsequent reference. Support for this could be found also from the Lord Justice General in *Brown v Stott* [2000] SLT 379, albeit that his Lordship was there dealing with a situation where the Convention was already incorporated into the domestic law and, therefore, that case should not neces-

sarily be read as providing much support for the ambiguity position.

20 In *T, Petitioner*, Lord President Hope failed to find any ambiguity but quite clearly states that if he had done so in the relevant context he would have given effect to the provision favouring the Convention Right.

21 He states as follows:

'The amicus curiae suggested that, if we were unclear as to whether the provisions of the 1978 Act were intended to allow applications such as that made by the petitioner, we should consider whether regard should be had to the European Convention on Human Rights as an aid to the construction of the Act. As he pointed out, Lord Ross, in *Kaur v Lord Advocate* [1981] SLT at p.330, said that, as the Convention was not part of the municipal law of the United Kingdom, the court was not, so far as Scotland was concerned, entitled to have regard to the Convention either as an aid to construction or otherwise. That opinion was expressed after a careful review of the English authorities. These consisted largely of various dicta in the Court of Appeal, where the judges stated that, if there was any ambiguity in the United Kingdom statute, the court may look at and have regard to the Convention as an aid to construction. But Lord Ross said that he shared the view of Diplock LJ, as he then was, that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation. For my part, I think that, read as a whole and in context, Diplock LJ's remarks in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB, at p.143, were not intended to indicate that the Convention could not be looked at in order to resolve an ambiguity. What he was saying was that the terms of the statute could not be departed from if they were clear and unambiguous. However that may be, Lord Ross's opinion, although widely quoted in the textbooks as still representing the law of Scotland on this matter, has been looking increasingly outdated in the light of subsequent developments, and in my opinion, with respect, it is time that it was expressly departed from.

It is now clearly established as part of the law of England and Wales, as a result of decisions in the House of Lords, that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not is conflict with it: see *R v Home Secretary ex parte Brind* per Lord Bridge of Harwich at [1991] 1 AC, pp.747H–748A. Similar views with regard to the relevance of the Convention were expressed by Lord Reid in *R v Miah* [1974] 1 WLR at p.694B–E, and by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC at pp.550D–551G. In *Anderson v HM Advocate* the opportunity was taken at [1996] SCCR, p.121; [1996] SLT, p.158, to refer to the Convention and to Lord Bridge's observations. But an opinion was reserved as to whether these observations were part of the law of Scotland also, as the court was not concerned with a matter of statutory interpretation in that case. It is however now an integral part of the general principles of European Community law that fundamental human rights must be protected, and that one of the sources to which regard may be made for an expression of these rights is international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories: see *Stair Memorial Encyclopaedia*, vol. 10, 'European Community Law', para 95. I consider that the drawing of a distinction between the law of Scotland and that of the rest of the United Kingdom on this matter can no longer be justified. In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge, namely that, when legislation is found to be ambiguous in the sense that it is capable of meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not conflict with it.'

22 619.1. 1738

This seems to us to accord with common sense against background of the general presumption that United Kingdom domestic law has been presumed to conform the Convention ever since the United Kingdom Government became a signatory to the Convention and obviously before such time as the Human Rights Act enacted the Convention into the United Kingdom domestic law (*T, Petitioner*, supra). The position seems to us to be compatible with the now accepted doctrine of ambiguity in relation to the construction of Parliamentary statute where reference can be made to Parliamentary debates background papers and the like to resolve the ambiguity by ascertaining the intention of Parliament. We consider the authorities entitle us to conclude at this point in time that if United Kingdom domestic legislation is ambiguous in the context of a potential Convention Right, the Convention may rule as between the two or more interpretations.

23 At the end of the day, Mr Truscott did not appear seriously to dispute this basic proposition, taking his stance on a determined position that there was no ambiguity in the interpretation of the word 'sex' both naturally and as focused by the Courts in the relevant decisions that he had referred to, not least *Smith v Gardner Merchant* and the recent decision of *Pearce*.

24 619.1, 1738

We do not consider that the two recent decisions of the European Court of Human Rights and, in particular, the Portuguese case of *Salgueiro*, have created an ambiguity but rather that they have focused one in the relevant word 'sex' found both in the SDA and Article 14 of the Convention. Intrinsically, the *Oxford University Dictionary* (1989 edn) inter alia includes a definition under the word 'sex' of 'a third sex which undoubtedly refers to homosexuality in both men and women. Since the word also can obviously mean gender as interpreted by the English courts, an obvious ambiguity arises on the face of the record. Extrinsically, the European Court of Human Rights has now expressly included sexual orientation in the definition of the word 'sex', as found in their Convention; we consider there is the classic example of a statutory ambiguity before us from two competent authorities and we therefore consider we have a choice of interpretation.

25 619.1, 1738

If this analysis is correct we have thereafter no hesitation in favouring the wider interpretation. The only case presented to us since the obvious change of circumstances created by the two recent European Court of Human Rights cases, is that of *Pearce*, which seems to have concentrated upon the existing state of the English law, and certainly there is no indication that the Convention cases were laid before the tribunal. In any event the substance of that case was dealing with comparators and applied *Smith v Gardner Merchant*, which in its terms is very clear.

26 In reaching our conclusion we have not been greatly influenced by the case of *Grant v South-West Trains* [1998] IRLR 188, since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word 'sex'.

27 619.1. 1738

In our opinion, accordingly, on the present state of the law, stated at the date of the dissemination of this judgment, the word 'sex' in the SDA should be interpreted to include, 'on grounds of sexual orientation'. In reaching this conclusion, we admit no criticism of the tribunal below who were directed to the essential issue of the reference against

sarily be read as providing much support for the ambiguity position.

20 In *T, Petitioner*, Lord President Hope failed to find any ambiguity but quite clearly states that if he had done so in the relevant context he would have given effect to the provision favouring the Convention Right.

21 He states as follows:

'The amicus curiae suggested that, if we were unclear as to whether the provisions of the 1978 Act were intended to allow applications such as that made by the petitioner, we should consider whether regard should be had to the European Convention on Human Rights as an aid to the construction of the Act. As he pointed out, Lord Ross, in *Kaur v Lord Advocate* [1981] SLT at p.330, said that, as the Convention was not part of the municipal law of the United Kingdom, the court was not, so far as Scotland was concerned, entitled to have regard to the Convention either as an aid to construction or otherwise. That opinion was expressed after a careful review of the English authorities. These consisted largely of various dicta in the Court of Appeal, where the judges stated that, if there was any ambiguity in the United Kingdom statute, the court may look at and have regard to the Convention as an aid to construction. But Lord Ross said that he shared the view of Diplock LJ, as he then was, that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation. For my part, I think that, read as a whole and in context, Diplock LJ's remarks in *Salomon v Commissioners of Customs and Excise* [1967] 2 QB, at p.143, were not intended to indicate that the Convention could not be looked at in order to resolve an ambiguity. What he was saying was that the terms of the statute could not be departed from if they were clear and unambiguous. However that may be, Lord Ross's opinion, although widely quoted in the textbooks as still representing the law of Scotland on this matter, has been looking increasingly outdated in the light of subsequent developments, and in my opinion, with respect, it is time that it was expressly departed from.

It is now clearly established as part of the law of England and Wales, as a result of decisions in the House of Lords, that in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not is conflict with it: see *R v Home Secretary ex parte Brind* per Lord Bridge of Harwich at [1991] 1 AC, pp.747H–748A. Similar views with regard to the relevance of the Convention were expressed by Lord Reid in *R v Miah* [1974] 1 WLR at p.694B–E, and by Lord Keith of Kinkel in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC at pp.550D–551G. In *Anderson v HM Advocate* the opportunity was taken at [1996] SCCR, p.121; [1996] SLT, p.158, to refer to the Convention and to Lord Bridge's observations. But an opinion was reserved as to whether these observations were part of the law of Scotland also, as the court was not concerned with a matter of statutory interpretation in that case. It is however now an integral part of the general principles of European Community law that fundamental human rights must be protected, and that one of the sources to which regard may be made for an expression of these rights is international treaties for the protection of human rights on which Member States have collaborated or of which they are signatories: see *Stair Memorial Encyclopaedia*, vol. 10, 'European Community Law', para 95. I consider that the drawing of a distinction between the law of Scotland and that of the rest of the United Kingdom on this matter can no longer be justified. In my opinion the courts in Scotland should apply the same presumption as that described by Lord Bridge, namely that, when legislation is found to be ambiguous in the sense that it is capable of meaning which either conforms to or conflicts with the Convention, Parliament is to be presumed to have legislated in conformity with the Convention, not conflict with it.'

22 619.1. 1738

This seems to us to accord with common sense against background of the general presumption that United Kingdom domestic law has been presumed to conform the Convention ever since the United Kingdom Government became a signatory to the Convention and obviously before such time as the Human Rights Act enacted the Convention into the United Kingdom domestic law (*T, Petitioner*, supra). The position seems to us to be compatible with the now accepted doctrine of ambiguity in relation to the construction of Parliamentary statute where reference can be made to Parliamentary debates background papers and the like to resolve the ambiguity by ascertaining the intention of Parliament. We consider the authorities entitle us to conclude at this point in time that if United Kingdom domestic legislation is ambiguous in the context of a potential Convention Right, the Convention may rule as between the two or more interpretations.

23 At the end of the day, Mr Truscott did not appear seriously to dispute this basic proposition, taking his stance on a determined position that there was no ambiguity in the interpretation of the word 'sex' both naturally and as focused by the Courts in the relevant decisions that he had referred to, not least *Smith v Gardner Merchant* and the recent decision of *Pearce*.

24 619.1, 1738

We do not consider that the two recent decisions of the European Court of Human Rights and, in particular, the Portuguese case of *Salgueiro*, have created an ambiguity but rather that they have focused one in the relevant word 'sex' found both in the SDA and Article 14 of the Convention. Intrinsically, the *Oxford University Dictionary* (1989 edn) inter alia includes a definition under the word 'sex' of 'a third sex which undoubtedly refers to homosexuality in both men and women. Since the word also can obviously mean gender as interpreted by the English courts, an obvious ambiguity arises on the face of the record. Extrinsically, the European Court of Human Rights has now expressly included sexual orientation in the definition of the word 'sex', as found in their Convention; we consider there is the classic example of a statutory ambiguity before us from two competent authorities and we therefore consider we have a choice of interpretation.

25 619.1, 1738

If this analysis is correct we have thereafter no hesitation in favouring the wider interpretation. The only case presented to us since the obvious change of circumstances created by the two recent European Court of Human Rights cases, is that of *Pearce*, which seems to have concentrated upon the existing state of the English law, and certainly there is no indication that the Convention cases were laid before the tribunal. In any event the substance of that case was dealing with comparators and applied *Smith v Gardner Merchant*, which in its terms is very clear.

26 In reaching our conclusion we have not been greatly influenced by the case of *Grant v South-West Trains* [1998] IRLR 188, since the European Court of Justice was then considering the issue of equal pay and not concerned directly with the definition of the word 'sex'.

27 619.1. 1738

In our opinion, accordingly, on the present state of the law, stated at the date of the dissemination of this judgment, the word 'sex' in the SDA should be interpreted to include, 'on grounds of sexual orientation'. In reaching this conclusion, we admit no criticism of the tribunal below who were directed to the essential issue of the reference against

附件 4

Euro Court Nixes British Gay Law

BELGIUM, Brussels (AP): The European Court of Human Rights ordered Britain to pay a homosexual man US$50,000 in costs and damages Monday for convicting him under legislation that outlaws gay group sex.

不必 The man's 1996 conviction was "interference with the applicant's right to respect for his private life" as guaranteed by the European Convention on Human Rights, ruled European judges in Strasbourg, France.

The man, identified by his initials, A.D.T., took his case to the European court after he was convicted of gross indecency for having sex with four other men during a party at his house.

Police found a video of the party during a search of the man's home.

A provision of Britain's Sexual Offenses Act, enacted in 1956, states that homosexual sex is illegal if more than two people take part or are present.

The legislation includes a number of laws applicable to homosexuals or heterosexuals, but the provision A.D.T. challenged applied only to homosexual males.

A panel of seven judges at the European court ruled unanimously that A.D.T.'s prosecution violated Article 8 of the European Convention on Human Rights, which safeguards respect for private life.

"The activities in the case were purely and genuniely private," the European court said.

The decision was hailed by gay-rights campaigners.

"This judgment drives a coach and horses through the gross indecency laws," said Angela Mason, executive director of Stonewall, a British gay rights group.

The European ruling increases pressure on the British government to scrap the law and replace it with new legislation that deals even-handedly with both "offensive heterosexual and homosexual behavior in public," Stonewall said in a statement.

The European Court of human rights was set up in 1950 to enforce the human rights convention, which has been signed by all 41 nations of the Council of Europe.

A.D.T. v. THE UNITED KINGDOM - 31-07-2000

(Associated Press 31 July 2000 - Paul Ames
by way of Graham Underhill)

Available at: http://www.gaylawnet.com/ [date: 10 Dec 2000]