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DISCRIMINATION DOWN UNDER: LESSONS FROM THE
AUSTRALIAN EXPERIENCE IN PROHIBITING
EMPLOYMENT DISCRIMINATION ON THE BASIS OF
SEXUAL ORIENTATION

Joshua Colangelo-Bryan

Abstract: Australia offers greater legislative protection against employment
discrimination on the basis of sexual orientation than does the United States. This
difference is not due to greater social or political awareness on the part of Australians.
Rather, Australian federal law results from the work of progressive national committees
given wide discretion to address discrimination under international agreements to which
Australia is a party. The creation of Australian federal laws is not instructive in the
U.S. context because the limited scope of these laws is incompatible with American
discrimination statutes. Furthermore, the process by which sexual orientation became a
proscribed ground under Australian federal laws is unlikely to occur in the United
States. In contrast, Australian state and territory laws addressing gay rights are often
the result of political compromise and frequently reflect familiar prejudices. While such
legislation is clearly less than ideal, it indicates that a strategy of compromise can be
successful in establishing protection against discriminatory employment practices. In
this respect, those working to extend protection against employment discrimination on
the basis of sexual orientation in the United States would be served by taking note of the
Australian state and territory experience.

I. INTRODUCTION

Currently, efforts are being made in both Australia and the United
States to provide greater legislative protection against employment
discrimination on the basis of sexual orientation. To date, Australia has
had more success in passing such legislation than has the United States.
This difference is surprising for several reasons: first, the issue of

1 In Australia, the parliament of the state of West Australia began consideration of the Gay Law Reform
Bill in September 1997. This bill would amend the state’s current Equal Opportunity Act to include “sexuality”
as a ground for complaint. WA: Gays Welcome Anti-Discrimination Bill Effort, AAP Newsfeed, Sept. 18, 1997,
available in LEXIS, Aust Library, Allnews File. In the United States, a Washington state initiative to prohibit
unfair employment practices on the basis of sexual orientation was defeated in November 1997. Rachel
Zimmerman & Scott Sunde, Gun, Marijuana and Gay Initiatives are Defeated, SEATTLE POST-INTELLIGENCER,
Nov. 5, 1997, at A1. Also during November 1997, U.S. President Clinton repeated his support for national
legislation that would provide employment protection to gays. Peter Baker, Clinton Takes Stand in Support of
Gays, SEATTLE POST-INTELLIGENCER, Nov. 9, 1997, at A1. Efforts are also being made to reduce the protection
available to gays. In February 1998, a Maine law which prohibited employment discrimination on the basis of
sexual orientation was repealed by referendum. Carey Goldberg, Maine Voters Repeal a Law on Gay Rights,

2 See discussion infra Part II.B.
providing equal rights to gays and lesbians is debated within a similar socio-political spectrum in Australia and the United States; second, efforts to win equality for gays began in the United States; third, Australia has a relatively short history with regard to employment discrimination law and has looked to the United States for guidance in this area; fourth, Australia is sometimes perceived as a rough and tumble outback where sensitivity to the rights of others is not a major concern.

This Comment will examine both how Australia has surpassed the United States in providing for gay rights in the workplace, and whether the Australian experience offers lessons for U.S. gay-rights activists. Part II of this Comment will discuss the cultural and political landscapes in the United States and Australia with regard to issues of import to gays. Part II will also examine the legislative protection available to those who suffer employment discrimination on the basis of sexual orientation in the United States and Australia. Part III will discuss the reasons for Australia's success in passing such legislation, and whether the legislative approaches used in Australia could be successful in the United States. Part IV will examine the practical value of Australian laws which address employment rights for gays.

This Comment concludes that the creation of Australian federal law offers few lessons to those advocating gay employment rights in the United States. Australian federal law differs greatly from U.S. law in both function and scope. Furthermore, "sexual preference" was made a proscribed ground largely due to the efforts of a progressive committee charged by the federal government with a broad mandate to combat

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3 See discussion infra Part II.B. For purposes of linguistic efficiency, the term "gays" will be used in this Comment to refer to both gay men and lesbians.
5 Australia’s first anti-discrimination legislation was passed by the state of West Australia in 1966, only two years after the Civil Rights Act was passed in the United States. However, the West Australia law required a plaintiff to prove that discrimination had occurred beyond a reasonable doubt, and during the 10 years of the law’s existence, only one successful claim was brought. The Racial Discrimination Act, 1975 was the first Australian legislation similar in operation to anti-discrimination law found in the United States. MARGARET THORNTON, THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA 36-37, 334 (1990).
6 ROSEMARY HUNTER, INDIRECT DISCRIMINATION IN THE WORKPLACE, 15 (1992). It should be noted, however, that the United States looked to Australia for guidance when considering policy regarding gays in the military, as Australia no longer bans gays from service. Carroll J. Doherty, Military Personnel: Heated Issue is Off to Cool Start as Hearings on Gay Ban Begin, CONG. Q. WKLY. REP., Apr. 3, 1993.
7 See discussion infra Part II.B.1.
This committee was created to comply with international agreements to which Australia is a party. Such a convergence of factors is unlikely to occur in the United States.

In contrast to the creation of Australian federal law, the creation of Australian state and territory law is instructive in the U.S. context. Australian state and territory statutes prohibiting discrimination on the basis of sexual orientation are often the product of political compromise and a willingness to appease those who hold common prejudices against gays. This compromise is indicated by the fact that such statutes limit liability for discriminatory conduct against gays under a wide range of circumstances. Furthermore, certain statutes refer to sexual orientation in vague and ambiguous terms. Because social attitudes and political dynamics with regard to gay rights are similar in the United States and Australia, the legislative tactics used to pass Australian state and territory discrimination laws could be of use in the United States.

This Comment also concludes that while laws marked by political compromise—such as those in several Australian states and territories—are far from ideal, they are preferable to a complete absence of legislation protecting gays. Such compromise laws can provide remedies to individuals who suffer employment discrimination on the basis of sexual orientation. They also may deter employers from engaging in discriminatory practices. Furthermore, the scope of such statutes may be expanded through judicial interpretation. Additionally, codifying an official preference against discrimination, even in qualified terms, may gradually influence community values. As social attitudes shift, rudimentary anti-discrimination laws may be made more comprehensive through amendment. For these reasons, advocates of legal protection for gays in the United States ought to examine the Australian experience.

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8 See discussion infra Part III.A.
9 See discussion infra Part III.A.
10 See discussion infra Part III.A.1.
11 See discussion infra Part III.B.
12 See discussion infra Part III.B.
13 Several statutes proscribe discrimination on the ground of "lawful sexual activity." Id.
14 See discussion infra Part III.C.
15 See discussion infra Part III.C.
16 See discussion infra Part III.C.
17 See discussion infra Part III.C.
II. BACKGROUND

A. Social and Political Dynamics Affecting Gay Rights

Australia and the United States have been described as societies which are marked by a conception of masculinity that results in the victimization of gays. While this characterization might be overly broad, similar hostility towards gays appears to exist in both countries. In fact, the negative experiences of gays in contemporary Australian society should be immediately familiar to those who stay abreast of such phenomena in the United States. In recent years, controversies have erupted in both countries over a wide range of issues concerning gays. These issues include the participation of gay organizations in public events, the role of gays in mainstream churches, and the banning of gays from military service. Additionally, studies in both the United States and Australia have shown that gays are the victims of discrimination.

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18 Joachim Kersten, Culture, Masculinities and Violence against Women, 36 BRIT. INST. FOR CRIMINOLOGY, 381 (1996).
20 An established minister in the Uniting Church of Australia decided to resign following negative reaction to her announcement that she was a lesbian. Retired Gay Minister to Speak at Woden Service, THE FED. CAPITAL PRESS OF AUSTL, Oct. 12, 1997, at A3. The U.S. Catholic church has expressed reservations about reaching out to gay parishioners because doing so might be seen as an approval of homosexuality. Caryle Murphy, Catholics Debate Homosexuality; Georgetown Discussion Takes Place Despite Cardinal’s Objections, WASH. POST, Dec. 7, 1997, at B4.
21 In Australia, the ban on gays serving in the military was lifted despite opposition described as “fierce.” Those opposed to lifting the ban expressed concerns over discipline and unit cohesion. Australia Lifts Defense Force Ban on Homosexuals, UPI, Nov. 23, 1992, available in LEXIS, News Library, US File. In the United States, Senator Sam Nunn, former Chairman of the Senate Armed Services Committee, described his primary concerns about gays serving in the military in similar terms. Doherty, supra note 6.
22 Anna Chapman, Sexuality and Workplace Oppression, 20 MELB. U. L. REV 311, 311 (1995) (citing studies conducted by Gay Men and Lesbians Against Discrimination indicating that 70% of gays and lesbians surveyed had been subjected to verbal abuse, assault or threat of assault); Tasmania Gay & Lesbian Rights Group, Media Releases (visited Nov. 24, 1997) <http://www.tased.edu.au/tasqueer/press_re/index8.html> (citing a study by Macquarie University that 40% of those surveyed had suffered from homophobic violence or abuse in the past year); Barbara Presley Noble, Linking Gay Rights and Unionism, N.Y. TIMES, Dec. 4, 1994, at F25 (citing a 1994 study in the United States which found that the average income of lesbians was significantly lower than that for heterosexual women and that a similar disparity existed between the incomes of gay and heterosexual men).
SEXUAL-ORIENTATION DISCRIMINATION

While evidence of such homophobia is clearly apparent in Australia and the United States, there are also well-established gay communities and advocacy groups in both countries. Sydney, one of Australia’s major metropolitan areas, is home to the largest gay community in the world, after that of San Francisco. Posters indicating that heterosexuals are not welcome have actually been spotted in parts of Sydney. This demonstrates that, as in the United States, a sense of security exists among members of the Australian gay community in certain enclaves. Australia, like the United States, is also home to a variety of organizations that work to further the interests of the gay community. These Australian organizations attempt to influence legislative processes and educate the public regarding issues of gay rights, as do their American counterparts.

In Australia, gay-rights issues, including those related to employment, are debated within a political context similar to that which exists in the United States. Traditionally, anti-discrimination legislation in Australia has been supported to the greatest extent by the Labor Party and with less vigor by the Liberal Party. The same political dynamic exists with regard to legislation prohibiting sexual-orientation discrimination. In this respect, Australia’s major political parties have claimed positions on

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24 Id.
25 Australian groups such as Gay Men and Lesbians Against Discrimination have actively attempted to influence the legislative process. See, e.g., Victoria, Parliamentary Debates, Legislative Assembly, May 25, 1995, 1724, available in Australian Legal Information Institute, World Law Links <http://www.austlii.edu.au/links/Australia/Governments/Victoria/>. The Tasmanian Gay & Lesbian Rights Group states its mission is to promote gay rights through legal activity, lobbying and education. Tasmanian Gay & Lesbian Rights Group, supra note 22.
26 In the United States, efforts to create legislation have included an unsuccessful attempt by a citizen group, “Hands Off Washington,” to pass an initiative that would have banned discrimination on the basis of sexual orientation. STATE OF WASHINGTON, VOTERS PAMPHLET 8 (Nov. 1997). The Lambda Legal Defense and Education Fund, a well-established U.S. organization, lists education as central to its mission. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., CITIES, STATES & COUNTIES PROHIBITING SEXUAL ORIENTATION DISCRIMINATION (1997).
27 The Labor Party is Australia’s established left-leaning party, while the Liberal Party is Australia’s predominant conservative party. THORNTON, supra note 5, at 24.
employment protection for gays similar to those held by their U.S. counterparts.  

In both the United States and Australia, political pressure is brought to bear on mainstream legislators not only by gay-rights advocates, but also by staunch conservative interests. In Australia, such conservative interests are often represented by the National Party. The National Party describes itself as representing rural Australia and is an outspoken critic of gay rights. In the United States, similar sentiments are frequently voiced by the most socially conservative elements of the Republican party. Furthermore, private groups have fought against legislation designed to secure gay rights in both countries. Some commentators have observed that the efforts of such conservative politicians and private organizations have a chilling effect on the political climates of both countries with regard to gay-rights issues.

29 In 1996 the Employment Non-Discrimination Act, which would have prohibited employment discrimination on the basis of sexual orientation, was defeated by a largely partisan vote. Forty-one of 47 Democratic senators voted for the bill while eight Republicans voted for the measure. David Jackson, Senate Rejects Gay Marriages, Anti-Bias Bill, DALLAS MORNING NEWS, Sept. 11, 1996, at A1.

30 See supra notes 25-26 for a brief discussion of groups which advocate on behalf of gays in Australia and the United States.

31 THORNTON, supra note 5, at 24.


35 During the debates over Victoria’s anti-discrimination bill, a citizens’ petition was read which stated that gays create public health risks and are inclined to molest minors. Victoria, Parliamentary Debates, Legislative Assembly, May 25, 1995, 1711, available in Australian Legal Information Institute, World Law Links <http://www.austlii.edu.au/links/Australia/Governments/Victoria/>. In the United States, the Christian Coalition was a strong opponent of the 1996 Employment Non-Discrimination Act which would have protected gays against employment discrimination. Cassandra Burrell, Senate’s Votes Defeats for Gays, BATON ROUGE ADVOC., Sept. 11, 1996, at 1A.

36 THORNTON, supra note 5, at 24-25; In 1996 Republican presidential candidates used gay-rights issues to appeal to fundamentalist voters, pledging to oppose the legalization of same-sex marriages, and returning contributions from gay political groups. Jacquelynn Floyd, Gays Feeling Increasingly Unwanted in Rightward-Leaning GOP, DALLAS MORNING NEWS, Feb. 17, 1996, available in 1996 WL 7920381.
B. Protection Against Employment Discrimination in Australia

1. Federal Law

A variety of Australian federal laws provide some degree of protection to those who suffer employment discrimination on the basis of sexual orientation. However, each of these federal laws contains significant limitations. Such limitations undercut the ability of many Australians to seek redress through federal legislation.

The Public Service Act prohibits discrimination on the basis of sexual preference, but only when suffered by Australian public employees. This prohibition applies to “appointments, transfers and promotions.” Under the Act, aggrieved public employees can enforce their rights in federal court or through administrative grievance procedures.

The Human Rights and Equal Opportunity Commission Act addresses workplace discrimination on the basis of sexual preference as a result of a 1989 amendment. The Act currently provides that the Human Rights Commission can hold an inquiry into a complaint of discrimination on the basis of sexual preference, and assist the involved parties in reaching a settlement through conciliation. However, the Commission has no power to force an employer to engage in conciliation and cannot initiate court proceedings against an employer it finds to have engaged in discrimination. Because of these limitations, the Act is seen to have only a moderate practical effect, particularly when discrimination complaints are made against private employers.

The Workplace Relations Act provides that an employer may not terminate most employees for certain reasons, including an employee’s sexual

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37 Public Service Act, 1922: Human Rights and Equal Opportunity Commission Act, 1986; Workplace Relations and Other Legislation Amendment Act, 1996. The processes by which these laws were created will be discussed in Part III.A, infra.
38 Public Service Act, 1922.
39 Id. at § 33(3).
40 Id. at § 33(3).
41 HUNTER, supra note 6, at 303.
45 Chapman, supra note 22, at 318.
46 HUNTER, supra note 6, at 287.
47 Workplace Relations and Other Legislation Amendment Act, 1996.
preference. To invoke the Act, an employee must demonstrate that she has no adequate alternative remedy under state discrimination statutes or industrial laws. Under the Act reinstatement and back pay are among the available remedies.

2. **State and Territory Law**

In addition to federal law, four of Australia's six states, and both of its two territories, offer some degree of statutory protection to those who suffer employment discrimination because of sexual orientation. A number of these laws use ambiguous language to describe the sexual-orientation ground and contain a variety of exemptions. However, state and territory laws are not limited as federal laws are with regard to remedies, those who may apply for relief, and the types of personnel decisions addressed. Thus, Australia's state and territory laws are closer in form to U.S. discrimination statutes than are Australia's federal laws.

State and territory anti-discrimination laws address gay rights in the workplace using several terms. The Anti-Discrimination Act in New South Wales outlaws discrimination on the basis of "homosexuality." Several other statutes make discrimination illegal on the ground of "sexuality." Sexuality is defined as "heterosexuality, homosexuality, bisexuality or transsexuality" by both the South Australian Equal Opportunity Act, and the

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48 Id. at § 170CK. The Act does not apply to certain employees, such as those who have contracts for fixed terms. Interview with Anna Chapman, Professor of Law, University of Melbourne (Dec. 20, 1997) [hereinafter Chapman Interview].
49 Chapman Interview, supra note 48.
50 Id.
51 WA: Gays Welcome Anti-Discrimination Bill Effort, supra note 1. Australian jurisdictions include New South Wales, South Australia, Queensland, Victoria, Tasmania, West Australia, the Australian Capital Territory and the Northern Territory.
52 See infra note 152.
53 See discussion supra Part II.B.1.
56 Id. § 49ZH (N.S.W.).
58 Equal Opportunity Act, 1984, § 5 (S. Austl.).
Northern Territory Anti-Discrimination Act.\textsuperscript{59} In the Australian Capital Territory’s Discrimination Act,\textsuperscript{60} sexuality is defined as “heterosexuality, homosexuality (including lesbianism) or bisexuality.”\textsuperscript{61} At the other end of the statutory spectrum from New South Wales are the states of Queensland and Victoria. Both states proscribe discrimination on the basis of “lawful sexual activity.”\textsuperscript{62} The Victorian Act defines this term to mean “engaging in, not engaging in or refusing to engage in a lawful sexual activity,”\textsuperscript{63} while the Queensland statute offers no definition.

As mentioned, state and territory laws apply to a wide range of employment decisions and can be invoked by a variety of aggrieved parties, in contrast to federal legislation. These state and territory laws are similar to each other in their prohibitions of employment discrimination. Each law prohibits discrimination in making hiring decisions and in fixing the terms upon which employment is offered.\textsuperscript{64} These acts also disallow discrimination against employees in the terms and conditions of employment, in training and promotional opportunities, and in the subjecting of employees to any detriment, including termination.\textsuperscript{65}

C. Protection Against Employment Discrimination in the United States

1. Federal Law

In contrast to Australia, the United States has no federal law prohibiting employment discrimination on the basis of sexual orientation.\textsuperscript{66}

\textsuperscript{60} Discrimination Act, 1991, (A.C.T.).
\textsuperscript{63} Equal Opportunity Act, 1995, § 4 (Vic.).
\textsuperscript{66} Steven Walters and Alan J. Borsuk, \textit{Speech to Christians}, MILWAUKEE J. SENTINEL, June 2, 1997, at A1. Federal courts have consistently ruled that Title VII’s prohibition of discrimination on the basis of sex does not extend to sexual-orientation discrimination. \textit{E.g.}, DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329-30 (9th Cir. 1979); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978).
Despite this, federal courts have created small pockets of protection for employees who suffer such discrimination. This protection has been created through constitutional means in some instances. In *Steffan v. Aspin*, a Department of Defense policy mandating the discharge of service members who stated they were gay was invalidated on equal protection grounds. The court held that the Department policy was unconstitutional because it was not rationally related to a legitimate government purpose. The court did not address, however, whether homosexuality is a suspect classification which requires a stricter standard of constitutional review. It should be noted that most courts have found homosexuality is not a suspect classification, and have upheld sexual-orientation classifications through rational-basis analyses.

Federal courts have also created protection for gay employees on the basis of civil service rules. In *Norton v. Macy*, a D.C. Circuit court reversed the dismissal of a protected civil servant who was fired for allegedly making a homosexual advance. The court held that before firing a gay employee, the civil service must demonstrate that the employee’s conduct will, in a reasonable and foreseeable manner, affect the efficiency of the service. The *Norton* rule has since been applied to non-protected civil service employees as well.

2. State and Local Law

Ten U.S. states have statutes outlawing discrimination in private employment on the basis of sexual orientation. Eighteen states proscribe

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68 *Id.* at 63.
69 *Id.*
70 *Id.*
73 Protected employees are those who can only be fired for cause that will promote the efficiency of the service. As a veteran, the fired employee in *Macv* was protected. *Id.* at 1162.
74 *Id.* at 1167.
75 *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Ca. 1973), *aff’d* 528 F.2d 905 (9th Cir. 1975).
76 These states are California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin. *Lambda Legal Defense and Education Fund, Inc.*, *supra* note 26; *Maine*, which is listed in the Lambda publication as prohibiting sexual-orientation discrimination, repealed its discrimination statute in February 1998. Goldberg, *supra* note 1. These 10
such discrimination in public employment. However, in eight of the states which prohibit discrimination in public employment, protection has been created by executive order. Executive orders can be rescinded by referendum or judicial invalidation and are, therefore, not a particularly secure source of legal protection.

At the local level, nearly one hundred municipalities prohibit discrimination because of sexual orientation in private employment. Over one hundred municipalities prohibit such discrimination in public employment. However, many of these cities are in jurisdictions where state law already proscribes discrimination against gays. In addition, local laws do not exist in the fifteen states which have not enacted state-wide protection for gay employees. Furthermore, in twelve states without state-wide protection, sexual-orientation discrimination is illegal in fewer than three cities.

III. ANALYSIS

A. The Creation of Australian Federal Law

Federal laws in Australia protecting gays from employment discrimination are the result of two distinct factors. The first of these is the set of obligations delineated by international agreements to which Australia is a party. The second is the activity of the National Committee on Discrimination in Employment and Occupation.

states comprise 20% of U.S. jurisdictions; in contrast, 75% of Australian jurisdictions provide protection from discrimination to gays in private workplaces.

These include the 10 states which prohibit private discrimination, as well as Colorado, Louisiana, Maryland, New Mexico, New York, Ohio, Pennsylvania and Washington. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., supra note 26.

Executive orders can be rescinded by referendum or judicial invalidation and are, therefore, not a particularly secure source of legal protection.


These municipalities include large cities such as New York, San Francisco, Chicago and Cleveland, as well as smaller towns such as Ann Arbor, Michigan; Yellow Springs, Ohio; Austin, Texas; and Portland, Maine. LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., supra note 26.

For example, in California, where state law makes employment discrimination against gays illegal, 26 cities prohibit discrimination in public employment and 14 cities prohibit discrimination in private employment. Id.

International agreements have been instrumental in winning a variety of gay rights. In 1994, a resident of Tasmania made a complaint to the United Nations Human Rights Committee, alleging that
In 1919 Australia joined the International Labor Organization ("ILO"), a body dedicated to improving labor standards through legislation.\textsuperscript{87} In 1973 the Commonwealth ratified ILO Convention No. 111—Discrimination (Employment and Occupation).\textsuperscript{88} The Convention defines discrimination as "any distinction, exclusion or preference" that impairs one's employment opportunities made on the basis of any of seven characteristics; sexual orientation is not included among these characteristics.\textsuperscript{89} Upon signing the Convention, Australia's federal government became obliged to make efforts to eliminate employment discrimination and to promote workplace equity.\textsuperscript{90} In order to comply with this Convention, the Commonwealth created the National Committee on Discrimination in Employment and Occupation ("Committee").\textsuperscript{91}

The Committee's mission included identifying grounds of discrimination in addition to the seven enumerated by Convention 111.\textsuperscript{92} During the course of its existence, the Committee identified an additional nine grounds of discrimination, including sexual preference.\textsuperscript{93} As a result, the Committee received 44 complaints on this ground between 1973 and 1985.\textsuperscript{94}

Tasmania's anti-sodomy law violated his rights under the International Covenant on Civil and Political Rights. Australia is a signatory of the Covenant. The U.N. Committee found Tasmania's law, which made sexual relations between consenting adult men illegal, to be an unreasonable violation of privacy and contrary to the Covenant. \textit{Australia to Override Tasmanian Antigay Laws, ASIAN POL. NEWS KYODO NEWS INT'L, INC., Aug. 29, 1994, available in 1994 WL 2089215.} In order to comply with the U.N.'s ruling and to meet its international obligations, Australia passed the Human Rights (Sexual Conduct) Act which disallows legal interference with consenting adult sex. \textit{Human Rights (Sexual Conduct) Act, 1994.}\textsuperscript{86}

See \textit{discussion infra} Part III.A.\textsuperscript{87}

Georgeana K. Roussos, \textit{Protections Against HIV-Based Employment Discrimination in the United States and Australia,} 13 HASTINGS INT'L & COMP. L. REV. 609, 647 (1990).\textsuperscript{88}

\textit{Id.}\textsuperscript{89}

The grounds contained in the Convention are race, color, sex, religion, political opinion, national extraction and social origin. Human Rights and Equal Opportunity Commission Act, 1986, Schedule I.\textsuperscript{90}

Roussos, \textit{supra} note 87, at 647.\textsuperscript{91}

\textit{Id.}\textsuperscript{92}

This endeavor was expressly provided for by the Convention. Other Committee activities included investigating and resolving by conciliation complaints of discrimination, and conducting educational programs to dissipate bias and prejudice. \textit{NAT'L COMMITTEE ON DISCRIMINATION AND EMPLOYMENT, TWELFTH ANN. REF. 1984-85, at 1} (1986).\textsuperscript{93}

The Committee appeared to intend that homosexuals, bisexuals and transvestites be protected by the sexual preference ground. \textit{Id.} at 51. The other grounds identified by the Committee were age, criminal record, marital status, medical record, nationality, personal attribute, physical disability and trade union activities. \textit{Id.} at 1.\textsuperscript{94}

For purposes of comparison, an equal number of complaints were received on the ground of social origin. \textit{Id.} at 34.
The Committee's willingness to recognize additional grounds of discrimination, including sexual preference, is likely the result of several factors. First, the Committee, while of diverse composition, included members who might have been expected to empathize with those suffering discrimination on any unfounded basis. These members included individuals charged with representing women, migrants and aboriginals, groups described by the Committee as "frequently encountering discrimination." Furthermore, many of the government officials on the Committee had professional backgrounds which might have indicated they would emphasize the rights of discrimination victims.

Second, the Committee also perceived itself as having a broad mandate to identify new grounds of discrimination. This mandate was found in the Convention provision which allowed member countries to identify grounds other than those enumerated by the Convention itself. The Committee believed that naming new grounds was necessary to address all discriminatory practices and, therefore, was an activity of great importance.

The Committee's identification of new grounds played a direct role in the development of federal legislation that provides protection against sexual-orientation discrimination. In addition to hearing complaints and identifying new grounds, the Committee's duties included advising the Attorney-General on issues relating to discrimination. In this capacity the Committee recommended that the Human Rights and Equal Opportunity Commission Act include grounds of discrimination in addition to those which Australia was compelled to recognize by Convention 111. Among these grounds was

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95 In addition to recognizing new grounds of discrimination, the Committee would consider complaints on grounds that it had not explicitly recognized and that were not enumerated by the terms of Convention 111. Id. at 37.
96 The Committees were made up of government, union and employer officials, as well as representatives of a variety of population groups. Id. at 1.
97 Id.
98 Id.
99 For example, in 1984-85, the Committee's government representative had worked for the Office of the Public Service Board on pay fixing and employment condition issues, while the Committee's Chairman had been a member of the National Labour Advisory Council Subcommittee on Women's Employment. Id. at 14.
100 Id. at 1.
sexual preference. As a result of this recommendation, the Human Rights and Equal Opportunity Commission Act was amended in 1989 to include ten additional grounds, including sexual preference, upon which complaints could be made.\textsuperscript{103} Also because of this recommendation, the Industrial Relations Act, now called the Workplace Relations Act, prohibits termination from employment on the basis of sexual preference.\textsuperscript{104}

In light of the Committee's activities, it is not surprising that there was little resistance\textsuperscript{105} to the inclusion of sexual preference as a proscribed ground in federal legislation. By the time the Commonwealth was considering the Human Rights Act, the Committee had been hearing and attempting to conciliate complaints of employment discrimination brought by gays for over fifteen years.\textsuperscript{106} In this way, the Human Rights Act, which provides for the conciliation of discrimination complaints,\textsuperscript{107} merely codified a long-standing practice.

An additional factor that may have facilitated the inclusion of sexual preference in federal discrimination laws is the limited scope of these laws. One statute addresses only public employees.\textsuperscript{108} A second applies only to terminations.\textsuperscript{109} A third addresses a wide range of employment practices and covers all employees, but contains no enforcement mechanism.\textsuperscript{110} Proscribing discrimination on the basis of a particular characteristic under laws that offer little protection to aggrieved employees is a fairly innocuous legislative activity and is unlikely to stir great debate or opposition.

\textsuperscript{103} State of Victoria, No. M46, A18 & P16 of 1994; FC 96/024, at *144-*145. In addition to sexual preference, the grounds covered by the Human Rights Act as a result of this amendment are the following: age, medical record, criminal record, impairment, marital status, mental, intellectual or psychiatric disability, nationality, physical disability, and trade union activity. Human Rights and Equal Opportunity Commission Regulations, § 4.

\textsuperscript{104} State of Victoria, No. M46, A18 & P16 of 1994; FC 96/024, at *145. There was virtually no discussion among members of parliament over the inclusion of sexual preference in the Workplace Relations Act. Economic References Committee, Hearing Transcript (visited Nov. 30, 1997) <http://www.agps.gov.au/parl/committee/s_menu.htm>. This indicates that the inclusion of sexual preference in the Human Rights Act had the effect of making sexual preference a virtually automatic ground for inclusion under subsequent federal discrimination laws.

\textsuperscript{105} Chapman Interview, supra note 48.

\textsuperscript{106} See supra note 94.

\textsuperscript{107} Human Rights and Equal Opportunity Act, 1986, § 11(f).

\textsuperscript{108} Public Service Act, 1922, § 33(3).

\textsuperscript{109} Workplace Relations and Other Legislation Amendment Act, 1996, § 170CK.

1. Lessons from the Creation of Australian Federal Law

The creation of Australian federal statutes offers little insight to those working for gay employment rights in the United States because the construction of Commonwealth legislation is not consistent with U.S. discrimination laws. As discussed, Australian federal law provides piecemeal protection to discrimination victims. By comparison, equal opportunity statutes in the United States are relatively comprehensive. Utilizing the Australian federal model to encourage the inclusion of sexual orientation as a proscribed ground would require breaking with well-established structures of discrimination law. Such a break has not been discussed, at least during debates over extending employment protection to gays. Furthermore, it would be unwise for those who desire increased protection against sexual-orientation discrimination to advocate for legislation providing such uneven protection.

In addition, the process by which sexual preference came to be a proscribed ground in Australian federal law is not instructive considering the U.S. political landscape. International agreements, which have played a prominent role in Australian legislation addressing gay rights, do not affect U.S. domestic policy on that issue. This lack of influence is indicated by congressional indifference to state sodomy laws. Such laws exist in many states, and were upheld as constitutional by the U.S. Supreme Court. That these laws violate an international covenant to which the United States is a party has not caused Congress to take legislative action of any sort.

111 See supra notes 108-10.

112 For example, the protection provided by Title VII is not limited to certain occupational groups or certain personnel decisions. Furthermore, it provides for judicially enforceable remedies. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994). State laws in the United States reflect the Title VII model rather than the piecemeal Australian federal approach. E.g., MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1997); MINN. STAT. ANN. § 363.03 (West 1997); N.J. STAT. ANN. § 10:5-12 (West 1997).

113 Early attempts to prohibit discrimination on the basis of sexual orientation focused on amending Title VII. To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation and for Other Purposes: Hearing Before the Subcomm. on Educ. and Labor, 96th Cong. 3 (1980) [hereinafter To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation]. The Employment Non-Discrimination Act, which would have provided federal protection to gays if passed, followed the traditional U.S. model fairly closely. S. 2056, 104th Cong. (1996).

114 Approximately one-half of U.S. States have sodomy laws. DAVID WESTFALL, FAMILY LAW 67 (1994).


Furthermore, the policy-making discretion enjoyed by the Australian National Committee on Discrimination will not be bestowed by the U.S. Congress upon a non-legislative body that is sympathetic to discrimination victims. Congress has never delegated the power to identify proscribed grounds of discrimination not contained in federal law.\(^{117}\) In light of the fact that Congress recently voted against extending employment protection to gays,\(^{118}\) it is inconceivable that it would allow an independent, non-legislative body to provide such protection.

**B. The Creation of Australian State and Territory Law**

As discussed, homophobia is prevalent in Australia.\(^{119}\) This prejudice is apparent in legislative debates regarding the passage of state and territory discrimination statutes.\(^{120}\) Indeed, these debates reveal several distinct and consistent themes of anti-gay bias.\(^{121}\) However, in most jurisdictions, the prevalence of such negative sentiments did not result in the exclusion of gays from discrimination laws. Rather, the themes of homophobia expressed during debates were accounted for and validated through exemptions which allow, under certain conditions, discrimination against gays.\(^{122}\) These themes were further recognized by statutes which describe the sexual-orientation ground with ambiguous language.\(^{123}\)

As such, exemptions and vague statutory language were the key factors behind the inclusion of a sexual orientation ground in many Australian state and territory laws. While exemptions and ambiguous statutory language dilute the protection provided by a sexual orientation ground, it is unlikely that the discrimination laws of several states and territories would have addressed gay rights at all without such concessions. Exemptions and vague

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117 The Equal Employment Opportunity Commission, perhaps the closest U.S. equivalent to the Australian National Committee on Discrimination, does not take an active role in advocating for the creation of new grounds of discrimination. Telephone Interview with Claire Cordon, Senior Trial Attorney, Equal Employment Opportunity Commission (Dec. 16, 1997).

118 Burrell, supra note 35.

119 See discussion supra Part II.A.

120 See infra notes 128-31, 136-37, 143-44, 148-51.


123 See infra notes 152-55.
two distinct purposes. First, many legislators who created discrimination statutes held common biases against gays themselves. These lawmakers indicated they would support employment protection for gays only if such protection were to be qualified in a variety of ways. Second, many legislators believed that it was politically inadvisable to protect gays from discrimination to the extent that others are protected. According to these politicians, the public demanded discrimination against gays be permitted in certain instances, and that discrimination laws not "endorse" a gay lifestyle.

The predominant theme of anti-gay bias expressed during legislative debates over discrimination laws involved the appropriateness of gays serving as teachers. Legislators and community members had two particular concerns in this regard. The first involved pedophilia. Some stated the belief that gays are more inclined towards child molestation than are heterosexuals. Those advancing this argument felt allowing discrimination against gays is essential to protecting children. Additionally, concern was expressed over the possibility of gay teachers promoting their lifestyle to students. In particular, legislators wanted to insure homosexuality would not be presented to children as an acceptable or normal lifestyle.

124 See infra notes 128, 136-37, 148-51.
129 The Victorian Scout Association stated it should be able to discriminate against gays in selecting youth leaders in order to protect young people from child molestation. Law Reform Commission of Victoria, Review of the Equal Opportunity Act, Report No. 36, at 25 (1990).
In direct response to these concerns, five of the six state and territory discrimination statutes which protect gays allow for discrimination against those who work with children. The exemptions in the laws of New South Wales and the Australian Capital Territory apply only in limited circumstances and are not specific to sexual orientation. The remaining statutes contain exemptions which apply to all child care situations and were intended to allow discrimination against gays specifically. In the Northern Territory, discrimination on the ground of sexuality is permissible when it is "reasonably necessary to protect the physical, psychological or emotional well-being of children." Queensland allows discrimination on the basis of lawful sexual activity under the same circumstances. Victoria’s Equal Opportunity Act permits discrimination when an employer has a "rational basis" for "genuinely [believing]" that discrimination is necessary to protect children.

Some legislators were also preoccupied with the notion that gay employees would be overt about expressing their sexual orientation. These lawmakers raised the possibility that employing individuals who appear to be gay could result in a loss of business for certain establishments. It was further suggested one might appear to be gay through either dress—including wearing an earring—or behavior.

Concerns such as these led to the passage of exemptions allowing for discrimination based on an employee’s appearance or general conduct. In South Australia discrimination is not illegal when it is "reasonable" in all circumstances and is based upon appearance or dress that is characteristic of one’s sexuality. No guidance is provided as to what sort of appearance or dress is indicative of sexuality. Victoria’s Equal Opportunity Act contains an exemption allowing

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135 Equal Opportunity Act, 1995, § 25 (Vict.). This exemption was originally intended to apply only to the ground of lawful sexual activity, but was extended to all grounds to silence those who opposed the exemption. Anna Chapman, The Impact of the Equal Opportunity Act 1995 (Vic) on Paid Work Relationships, AUSTL. J. LAB. L. at *47 (1996), available in LEXIS, Aust Library, Aujnls File.
137 Id. at 327 (citing South Australia, Parliamentary Debates, Legislative Council, Oct. 31, 1984, 1635).
139 This implies, perhaps, that picking gays out of a crowd is a fairly straightforward activity.
discrimination based not only on appearance or dress, but also on behavior.\(^{140}\) While this exemption applies to all proscribed grounds,\(^ {141}\) the legislative history of the Act makes clear this provision is directed at gays.\(^ {142}\)

An additional theme of anti-gay bias rested on the assumption that protecting gays from discrimination could have adverse health consequences. Those opposed to including sexuality as a proscribed ground in Victoria argued that being in close proximity to gays increases one's chances of HIV infection.\(^ {143}\) Other citizen groups in Victoria asserted that homosexuals are disproportionately affected by hepatitis and will pass the disease to the public when they work in restaurants, hospitals or schools.\(^ {144}\)

Such fears are addressed by provisions in two statutes which allow for discrimination necessary to protect public health. In the Northern Territory Anti-Discrimination Act, discrimination on the basis of impairment, which is normally a proscribed ground, is allowed if necessary for health purposes.\(^ {145}\) According to the Act, one who suffers from AIDS or is HIV positive would be viewed as having an impairment, and thus, could be discriminated against under the public health exemption.\(^ {146}\) Victoria's Equal Opportunity Act contains clauses very similar to these.\(^ {147}\)

It is clear that many lawmakers not only had specific fears regarding gays, but also a general belief that homosexuality is not a morally acceptable practice. Some described homosexual practices as mentally and physically destructive.\(^ {148}\) Others described gays as leading abnormal lives,\(^ {149}\) not acceptable to mainstream

\(^{140}\) Equal Opportunity Act, 1995, § 24 (Vic.).

\(^{141}\) Id.

\(^{142}\) It was noted by lawmakers that most exemptions were enacted to appease those made uneasy by protecting gays from discrimination. Victoria, Parliamentary Debates, Legislative Assembly, May 25, 1995, 1721, available in Australian Legal Information Institute, World Law Links <http://www.austlii.edu.au/links/Australia/Governments/Victoria/>.

\(^{143}\) LAW REFORM COMMISSION OF VICTORIA, supra note 129, at 24.


\(^{146}\) Id. at § 4.

\(^{147}\) Equal Opportunity Act, 1995, § 80, 4 (Vic.).


There was little question for such lawmakers that heterosexual and homosexual lifestyles are not equally valid.\footnote{\textit{Id.} at 30.}

One result of accommodating this mindset is the equivocal language with which some statutes describe the sexual orientation ground. In Queensland and Victoria discrimination is prohibited on the basis of "lawful sexual activity."\footnote{\textit{Equal Opportunity Act 1995 ( Vict.), § 6; Anti-Discrimination Act, 1991-1992 (Queensl.), § 7.}} In Victoria, the Scrutiny of Acts and Regulations Committee, which had been charged with evaluating the state's discrimination law, recommended that "lawful sexual orientation/sexuality" be made a proscribed ground.\footnote{\textit{SCRUTINY OF ACTS AND REGULATIONS COMMITTEE, REVIEW OF THE VICTORIAN EQUAL EMPLOYMENT OPPORTUNITY ACT, FINAL REPORT 23} (1993). The recommendation that this ground be included resulted, in part, from a desire to bring Victoria's discrimination laws in line with those of other states and the Commonwealth. \textit{Id.} at 19-20.} However, it was believed by legislators that adopting this recommendation outright would be seen as an approval of the gay lifestyle.\footnote{\textit{Victoria, Parliamentary Debates, Legislative Council, June 1, 1995, 1070, available in Australian Legal Information Institute, World Law Links \<http://www.austlii.edu.au/links/Australia/Governments/Victoria/>.}} In contrast, the ground of "lawful sexual activity" was seen as providing some protection against discrimination for gays while not condoning disfavored behavior.\footnote{\textit{Id.} It has also been noted that the use of the word "lawful" suggests that there is some aspect of gay activity which is unlawful. \textit{Victoria, Parliamentary Debates, Legislative Assembly, May 25, 1995, 1724, available in Australian Legal Information Institute, World Law Links \<http://www.austlii.edu.au/links/Australia/Governments/Victoria/>.}\textit{Such an implication likely would be welcomed by those who want to insure that protecting gays from certain forms of discrimination is not seen as broad approval of gays.}}

1. Lessons from the Creation of Australian State and Territory Law

While the value of Australian discrimination laws is open to debate,\footnote{See infra Part III.C for a discussion of why laws providing protection to gays in qualified terms are of value.} the processes by which these laws were created is instructive in the U.S. context. Specifically, the legislative tactic of including exemptions and vague statutory language in statutes protecting gays could prove useful in U.S. states and at the federal level. This strategy would serve twin purposes. First, as in Australia, such an approach would address, and perhaps assuage, the specific anti-gay biases which have derailed many efforts to create gay rights in the workplace. Second, exemptions and vague language would provide cover to
legislators who believe it politically imprudent to support comprehensive protection for gays.

American debates over extending protection against employment discrimination to gays have been similar in tone and content to those which have occurred in Australia. In particular, discussions in both countries have revealed identical themes of anti-gay bias.

Those opposing gay employment rights in the United States have echoed their Australian counterparts in expressing grave concerns over gays working with children. Such individuals have suggested several reasons for not protecting gay teachers and child care workers from discrimination. One reason for allowing such discrimination, according to gay-rights opponents, is to protect children from molestation. Furthermore, legislators and others have repeatedly stated that allowing discrimination against gay teachers is essential to keep such teachers from promoting a gay lifestyle and to insure that teachers are of a proper moral fiber.

157 The first attempt to create federal protection against employment discrimination on the basis of sexual orientation was made in 1975 by Congresswoman Bella Abzug of New York. See To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation, supra note 113, at 110.

158 The participants of Australian debates expressed concerns over gays working with children, health risks created by gay employees, and the possibility that overtly gay employees would drive away a business' customers. Furthermore, it was argued that homosexuality is immoral. See discussion supra Part III.B.

159 See supra notes 128-31.

160 In an early debate over amending Title VII to include a sexual orientation ground, it was suggested an exemption should be included to allow for discrimination against gay pedophilia. See To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation, supra note 113, at 78. Supporters of gay rights have long recognized that some opponents believe allowing gays to work without fear of discrimination increases the potential for child molestation. Id. at 13.

161 To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation and for Other Purposes: Hearing Before the Subcomm. on Empl. Opportunities of the Comm. on Educ. and Labor, 97th Cong. 18 (1982) [hereinafter To Prohibit Discrimination]. During debates over the 1996 Employment Non-Discrimination Act, U.S. Senator Don Nickles opined that America "isn't ready yet for gay Boy Scout leaders." Marcia Stepanek, Senate Takes Up Two Major Votes on Gay Rights, SAN FRANCISCO EXAMINER, Sept. 10, 1996, at A10. This is similar to sentiments expressed by the Scout Commission in Victoria, Australia. See LAw RefORM COMMISION OF VICTORIA, supra note 129, at 25. In 1994, efforts were made by Oregon activists to pass a referendum which would have prohibited teaching that homosexuals are the "legal or social equivalent" of other population groups. David W. Dunlap, Struggle Over Gay Rights Moves to Statewide Level, N.Y. TIMES, Nov. 6, 1994, at 15. In 1996, Senator Orrin Hatch suggested it imprudent to allow gays to work with children who are establishing personal identities. 142 CONG. REC. S10,132 (1996). The Minnesota statute which disallows sexual-orientation discrimination contains a provision stating that the promotion of homosexuality in schools is not authorized. MINN. STAT. ANN. § 363.021 (West 1997).

162 Senator Don Nickles suggested if school boards in states such as Alabama and West Virginia want to discriminate against gay teachers because gays are sexually promiscuous, they should be so able. 142 CONG. REC. S10,067 (1996).
Americans who oppose protecting gays from employment discrimination have also raised public health concerns similar to those heard in Australia. As early as 1980, those involved in legislative debates over amending Title VII argued that gay employees were particularly susceptible to hepatitis and other diseases. For this reason, gay employees could create health risks by working in food service positions. It was suggested in subsequent discussions that occupational safety would be compromised by the presence of gay employees who would be incompatible with other workers.

Legislators and private citizens in the United States, as in Australia, have also based their opposition to gay employment rights on moral grounds. According to this argument, homosexuality is proscribed theologically and, in many instances, legally. To grant employment protection to gays would amount to validating activity that has thus been widely condemned as unacceptable and would reflect the moral decline of America. Furthermore, such protection would interfere with the sincere religious beliefs of many Americans who would be forced to work with gays.

Those opposing full employment protection for gays in Australia and the United States make virtually identical arguments. The specific exemptions contained in many Australian statutes could, therefore, be

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163 See supra notes 143-44.
164 See To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation, supra note 113, at 56. A San Francisco minister opposed to creating a proscribed sexual-orientation ground noted high rates of venereal disease in his city as evidence that gays are disproportionately affected by particular ailments. Id. at 26, 27.
165 Id. at 56.
166 See To Prohibit Discrimination, supra note 161, at 40.
167 See supra notes 148-51.
168 These moral concerns are reflected in several U.S. state laws which prohibit sexual-orientation discrimination. These laws declare that prohibiting discrimination against gays should not be construed as an approval of homosexuality. E.g., R.I. GEN. LAWS § 28-5-6(13) (1995); CONN. GEN. STAT. ANN. § 46a-81r (West 1995).
170 Jill Lawrence, Anti-Gay Marriage Bill OK'd Senate then Rejects Bid to Ban Job Bias, USA TODAY, Sept. 11, 1996, at IA.
171 Trent Lott, the Senate Majority Leader, voiced these sentiments during debates over the Employment Non-Discrimination Act. See Burrell, supra note 35.
172 Senator Jesse Helms voiced this belief. Stepanek, supra note 161.
applicable in the United States. In particular, the child care and public health exemptions found in many Australian discrimination laws\textsuperscript{174} might alleviate the fears of U.S. legislators and citizens who genuinely believe discrimination against gays may be necessary in schools or for health reasons. These exemptions, while reflecting unsavory stereotypes, could reassure such individuals that protecting gays from discrimination would not increase the risk of child molestation or health crises. This, in turn, could win increased support for gay employment rights among those with well-intentioned, if misinformed, concerns about the presence of gay employees in certain workplaces.

Furthermore, the inclusion of such exemptions in discrimination statutes removes powerful and politically viable arguments from the arsenal of anti-gay-rights activists. If a discrimination statute which protects gays also allows for discrimination against gay teachers, it is difficult to argue such a statute encourages pedophilia or converting children to homosexuality. If a discrimination statute allows for discrimination necessary to protect public health, it is difficult to argue such a law endangers the public welfare. Without arguments based on such inflammatory issues, those who work most vociferously against gay employment may have a more difficult time winning the support of moderate politicians and voters.

Employing vague language to describe the sexual orientation ground, as is done in several Australian statutes,\textsuperscript{175} might also be useful in certain U.S jurisdictions. A phrase such as "lawful sexual activity" has little history in the United States and may connote homosexuality less obviously than does "sexual orientation." Also, the focus of the ground is legally acceptable behavior. It is perhaps awkward to argue society is served by allowing discrimination on the basis of legal acts. As a result, a ground such as "lawful sexual activity" might serve—as it did in Australia\textsuperscript{176}—to invoke less feverish resistance than "sexual orientation" among U.S legislators and citizens with moral objections to homosexuality. Of course, such a ground would likely be of little value to those who suffer discrimination because of sexual orientation in states which have sodomy laws.\textsuperscript{177}

The use of exemptions or vague statutory grounds could also provide cover for U.S. legislators concerned with the political repercussions of

\textsuperscript{174} See supra notes 133-35, 145-47.

\textsuperscript{175} The ground of "lawful sexual activity" is used by several statutes. See supra note 152.

\textsuperscript{176} See supra notes 154-55.

\textsuperscript{177} Approximately one-half of U.S. states have such laws. See Westfall, supra, note 114.
supporting gay rights. Indeed, prominent U.S. legislators with little personal animosity towards gays have often demonstrated a belief that unequivocal support for gays is not politically advisable. These legislators might be more willing to support employment protection for gays if such protection were not comprehensive, were not seen as endorsing a gay lifestyle, and allowed for discrimination under particular circumstances. Legislators could argue that supporting such protection is not demonstrative of being beholden to the gay lobby. Rather, these legislators could argue that such protection is consistent with the principle that merit should be the basis for employment decisions, absent public policy concerns such as those addressed by statutory exemptions.

Recent U.S. legislative history indicates that statutes which provide gay employment rights in somewhat qualified terms are more viable than legislation which treats gays identically to other protected classes. In 1996, Congress came within one vote of passing the Employment Non-Discrimination Act, which would have created federal protection against employment discrimination on the basis of sexual orientation. This bill would have provided less protection to gays than is available to individuals covered by most other federal discrimination statutes. First, the bill contained exemptions allowing for discrimination by the military and disparate-impact discrimination. Second, the bill specifically prohibited the use of quotas based upon sexual orientation, and stated employers were not required to provide benefits to same-sex partners of employees. These

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178 Former Senator Bill Bradley, a long-time supporter of liberal causes, argued for the inclusion of statistics of crimes against gays during debates over the Hate Crimes Bill. He made clear, however, that this argument should not be construed as approval of a gay lifestyle. Telephone Interview with Suzanne Goldman, Staff Attorney, Lambda Legal Defense and Education Fund (Dec. 17, 1997) [hereinafter Goldman Interview]. Former Senator Bob Dole accepted, returned and accepted again a contribution from a gay Republican group during his 1996 presidential campaign. Dole, after returning the contribution, said he did not want to create the appearance of "buying into some special rights for any group." Richard L. Berke, Dole, in Shift, Says Refund of Gay Gift was Staff Mistake, N.Y. TIMES, Oct. 18, 1995, at A1. In 1996, Newt Gingrich, Speaker of the House of Representatives, advised long-time political ally Steve Gunderson, an openly gay Republican, that Gunderson would not be given a chairmanship of a House committee because of Gunderson’s sexual orientation. David W. Dunlap, Gay Couple Seeks GOP Niche, NEWS & OBSERVER, Oct. 9, 1996, at E7.

179 See Jackson, supra note 29.


exemptions and provisions were included by supporters of the bill who believed such concessions to be politically essential to the bill’s passage.\textsuperscript{183} This strategy must be credited in part for the fact that the Employment Non-Discrimination Act nearly became law, while earlier efforts to create a proscribed ground of sexual orientation generally foundered in committees.\textsuperscript{184} These earlier efforts focused on amending Title VII to include sexual orientation, thus providing gays protection equal to that of other protected individuals.\textsuperscript{185}

C. \textit{The Value of Laws Which Provide Qualified Protection to Gays}

There was strong opposition on the part of gay-rights advocates to the inclusion of exemptions and the use of the “lawful sexual activity” ground in Australian discrimination statutes.\textsuperscript{186} These advocates argued that exemptions, such as those providing for discrimination against gay teachers\textsuperscript{187} are underinclusive\textsuperscript{188} and unnecessary,\textsuperscript{189} serving no purpose but to appease homophobes.\textsuperscript{190} As such, these exemptions may allow and encourage anti-gay prejudice.\textsuperscript{191} Proponents of gay rights also argued that the ground of “lawful sexual activity” implied that some aspect of gay

\begin{footnotesize}
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\item \textsuperscript{183} Goldman Interview, supra note 178.
\item \textsuperscript{184} See To Prohibit Discrimination, supra note 161, \textit{To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation}, supra note 113.
\item \textsuperscript{185} See To Prohibit Discrimination, supra note 161, at 4; \textit{To Prohibit Discrimination on the Basis of Affectional or Sexual Orientation}, supra note 113, at 3.
\item \textsuperscript{186} In Victoria, the Labor party even withdrew its support of the Equal Opportunity Act purportedly because of the compromised protection offered to gays. \textit{Victoria, Parliamentary Debates}, Legislative Assembly, May 25, 1995, 1718, \textit{available in Australian Legal Information Institute, World Law Links <http://www.austlii.edu.au/links/Australia/Governments/Victoria/>}. \textsuperscript{187} See supra notes 133-35.
\end{itemize}
\end{footnotesize}
activity is unlawful\textsuperscript{192} even in the absence of sodomy laws.\textsuperscript{193} Furthermore, it was argued that this ground ignored the fact that being gay is an identity, not an activity.\textsuperscript{194}

Despite the validity of these arguments, discrimination laws providing for gay rights, even in qualified terms, are of value. First, such laws create the possibility of redress for individual gays who are denied employment rights. Indeed, claims are brought by gays under Australian discrimination laws which contain exemptions allowing for sexual-orientation discrimination.\textsuperscript{195} These claims may result not only in damage awards, but may also allow individuals to air grievances in an official forum, and receive judicial confirmation that discrimination against gays is unacceptable. These financial and emotional benefits are currently unavailable to gays in most U.S. jurisdictions.\textsuperscript{196} Statutes providing even limited protection to gays would improve the lot of those who suffer sexual-orientation discrimination in such jurisdictions.

In addition to providing remedies to aggrieved individuals, discrimination laws which are limited in scope also have deterrent value.\textsuperscript{197} The possibility of being subjected to litigation may give pause to an employer who would otherwise base personnel decisions on anti-gay bias. This is true even when it could be argued that a decision falls within a legislatively provided exemption. A discrimination exemption has no effect on the calculation of damages if the exemption is found not to be applicable.

Furthermore, favorable judicial interpretation of discrimination statutes of limited scope could extend the protection provided to gays by such laws. For example, a statute could contain an exemption allowing for reasonable discrimination against gay teachers. Interpreting that exemption to require an objectively discernible and immediate threat to

\textsuperscript{192} See supra note 155.

\textsuperscript{193} See Australia to Override Tasmanian Antigay Laws, supra note 85.


\textsuperscript{195} In South Australia the Equal Opportunity Act allows for reasonable sexuality discrimination. See supra note 138. During 1992-1993, 27 complaints were brought on the ground of sexuality in South Australia. This represented three percent of all complaints. Chapman, supra note 22, at 330 n.90; in Queensland, the Anti-Discrimination Act contains a child care exemption. See supra note 134. Complaints have been brought under that act nonetheless. Chapman, supra note 22, at 331 n.90.

\textsuperscript{196} See supra notes 66, 76-77.

\textsuperscript{197} This is a recognized and important purpose of discrimination legislation. Goldman Interview, supra note 178.
children could keep the exemption from having much application. Whether such interpretation will occur in Australia is unclear, as the sexual-orientation exemptions in Australian statutes have not yet been the subject of judicial treatment. Courts in Australia have, however, interpreted other statutes favorably with regard to gay rights. U.S. judicial interpretation of similar provisions would vary by district and circuit, but favorable interpretation could be expected in some jurisdictions.

Legislation which provides limited protection to gays should not be viewed as an end unto itself. Rather, it should be seen as the beginning of an incremental process to win comprehensive employment rights for gays. As a subsequent step in this process, laws may be amended to provide more complete protection. It is likely such amendments will be passed more easily as public sentiment regarding gays becomes increasingly accepting. Toward this end, the codification of a preference against sexual-orientation discrimination, even in qualified terms, may actually facilitate the transformation of public sentiment.

IV. CONCLUSION

Australia has surpassed the United States in providing for gay employment rights, but not as a result of more progressive socio-political attitudes. Instead, federal protection against sexual-orientation discrimination in Australia results from the work of committees charged with combating

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198 In one case, an immigration review tribunal addressed an immigration law which provides that extended eligibility entry permits can be granted to those who have "close" relationships with Australian citizens. The tribunal held a genuine homosexual relationship was "close" for the statute's purposes. Re: S P #Number 2695, IRT No. N93/00319 (Immig. Rev. Tribunal Oct. 5, 1993). In another case, a federal court in Australia interpreted a regulation providing that foreign affairs officers living with spouses on overseas assignments are due a particular allowance. The court ruled that a foreign service officer who was in a stable homosexual relationship was living with a spouse under the regulation. Muller v. Human Rights and Equal Opportunity Commission and ANOR, NG 504 of 1997, 1997 Aust. Fedct. LEXIS 531, at *2 (July 17, 1997).

199 In Colorado, for example, courts have interpreted a statute banning discrimination on the basis of "lawful activity" to provide protection to gay employees. Marsh v. Delta Airlines, Inc., 952 F.Supp. 1458, 1461 (D. Colo. 1997). The statute was intended to protect smokers from discrimination. Goldman Interview, supra note 178.

200 Gay-rights advocates have recognized that such an incremental process may be necessary to win gay rights in the workplace and beyond. For example, recent efforts to win gay rights at the federal level have focused on employment discrimination rather than housing discrimination. Securing employment rights is seen as more politically feasible than securing housing rights. Goldman Interview, supra note 178.

201 Gay-rights proponents in Australia have urged that efforts be taken to amend laws containing undesirable exemptions. Camilla Hughes, Calling All Ratbags and Paint Throwers, 18 ALTERNATIVE L.J. 92, 93 (1993).
employment discrimination. These committees were created to meet Australia's obligations under international civil-rights agreements. Australia's experience in creating federal law offers few lessons to those advocating for gay employment rights in the United States. First, the limited nature of Australia's federal laws makes them incompatible with most U.S. discrimination statutes. Second, international instruments and non-legislative bodies have not played a role in the creation of U.S. employment laws, and are unlikely to do so in the future.

Australian state and territory laws which address the rights of gays in the workplace, on the other hand, are often the result of political compromise. This is demonstrated by the exemptions contained in many laws, and by the use of vague language to describe the sexual-orientation ground. The Australian approach to creating state and territory law could thus be instructive for gay-rights advocates in the United States. U.S. legislators and private citizens share many anti-gay biases with their Australian counterparts. The use of exemptions and vague statutory language could assuage the fears of those who genuinely believe that discrimination against gays is necessary in certain instances. This legislative strategy would also disarm the most common arguments of steadfast gay-rights opponents, and provide cover to politicians who support gay employment rights, but who do not want to be seen as promoting homosexuality. Ultimately, legislation created through compromise may win the support of some who oppose protecting gays from workplace discrimination in the United States.

Moreover, laws which validate homophobia while prohibiting sexual-orientation discrimination are clearly less than ideal, yet are of significant value. Under a compromise statute, judicial remedies are available to individual discrimination victims, and employers may be deterred from discriminatory behavior. Furthermore, laws of limited scope may be expanded through judicial interpretation. Finally, an official prohibition of discrimination against gays, even expressed in qualified terms, may engender increased public acceptance of the gay community. As attitudes become more accepting, laws may, through amendment, be made more appropriately comprehensive.