



Same-Sex Inquiry,
Human Rights Unit,
Human Rights and Equal Opportunity Commission
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Dear Sir or Madam,

Thank you for the opportunity to participate in the Human Rights and Equal Opportunity Commission inquiry into discrimination against people in same-sex relationships.

People in same-sex relationships do not currently enjoy the same rights as other Australians. While all States and Territories have passed anti-discrimination legislation to combat discrimination against gay, lesbian, bisexual and transgender people, the Commonwealth government has yet to do so.

AFAO welcomes the Commission's inquiry into financial and work-related entitlements for people in same-sex relationships. We hope that the Commission will work toward eliminating discrimination against people in same-sex relationships.

Please find attached our submission to the Inquiry. If you have any further queries regarding this submission, please do not hesitate to contact me on (02) 8568 1100.

Yours sincerely

Mark Bebbington
Ag/Executive Director

Same-Sex: Same Entitlements

The Australian Federation of AIDS Organisations (AFAO)

The Australian Federation of AIDS Organisations (AFAO) represents Australian HIV community-based organisations at a national level. Our membership includes State and Territory AIDS Councils, the Australian Injecting and Illicit Drug Users League, the National Association of People Living with HIV/AIDS (NAPWA) and Scarlet Alliance, the national organisation representing sex workers. Amongst AFAO's activities is the provision of HIV policy advice to the Commonwealth government, advocating for our member organisations, developing and formulating policy on HIV/AIDS issues, and promotion of medical and social research into HIV/AIDS and its effects.

Background to this Submission

People with HIV/AIDS are significantly affected by discrimination against same-sex couples. At the end of 2004, there were an estimated 14,840 people in Australia living with HIV/AIDS¹. The majority of these people are gay men: sexual transmission between men accounted for over 85% of new HIV diagnoses in Australia during 2004. Gay and bisexual men also represented 82% of respondents to the *HIV Futures* survey of people living with HIV². Almost half of people with HIV/AIDS reported that they are currently in a relationship and over 80% of these named their partner as their primary source of social support³.

People with HIV are typically high users of health services, with 87% having used antiretroviral therapy at some time. Another 58% of people living with HIV had stopped work at some time for reasons related to their health, and over half reported that their main source of income was a government pension or benefit.

AFAO affirms the right of gay and lesbian Australians to equal enjoyment of human rights. We welcome this Inquiry as an opportunity to address discrimination against same-sex couples and work toward equality for all Australians regardless of sexuality.

Same sex, same rights?

The *Same-Sex: Same Entitlements Discussion Paper* prepared by the Commission begins by acknowledging that many of Australia's laws exclude same-sex couples from financial and work-related entitlements, and says that 'same-sex couples do not enjoy the same tax and health concessions as other de facto couples'. By defining

¹ McDonald, A. (2005) '2005 Annual Surveillance Report: HIV/AIDS, viral hepatitis and sexually transmissible infections in Australia', National Centre in HIV Epidemiology and Clinical Research.

² Grierson, J. *et al* (2004) 'HIV Futures 4: State of the [positive] Nation', The Living With HIV Program, Australian Research Centre in Sex, Health and Society.

³ Grierson, J. *et al* (2004) 'HIV Futures 4: State of the [positive] Nation', The Living With HIV Program, Australian Research Centre in Sex, Health and Society.

same-sex couples as a kind of de facto couple in this way, the inquiry implicitly denies the possibility of equality for people in same-sex relationships: the equality represented by the right to marry.

The Marriage Act 1961 and the Marriage Amendment Act 2004 are not included within the Terms of Reference of this Inquiry. This is a glaring omission, particularly in light of the fact that the terms 'marriage' and 'spouse' as used in legislation relating to financial and work-related entitlements are typically defined with reference to the Marriage Act. AFAO therefore urges the Human Rights and Equal Opportunity Commission to expand the Terms of Reference of this inquiry to include the Marriage Act.

This Submission

This submission addresses laws relating to the areas identified in the Commission's background brief to this Inquiry. This submission confines itself to Commonwealth legislation, though AFAO supports submissions relating to State legislation made by our member organisations.

1. Workplace leave entitlements

The Workplace Relations Amendment (Work Choices) Act 2005 defines minimum standards relating to working conditions in the absence of an Award. This Act will be used more widely as more workplace agreements are developed outside the existing Award framework. The Work Choices Act defines a de facto spouse as:

'a person of the opposite sex to the employee who lives with the employee as the employee's husband or wife on a genuine domestic basis although not legally married to the employee'.

This definition excludes same-sex couples and is clearly discriminatory in its impact. That such legislation could be implemented in 2005 shows a clear lack of commitment on the part of the Australian Government to eliminating discrimination against people in same-sex relationships.

While Section 244, which entitles workers to take carers' leave to care for a person living in their household will generally allow people in same-sex relationships who live together access to carer's leave, same-sex couples will not be able to access paternity or adoption leave. For instance, the provisions in the legislation relating to paternity leave state that:

- (1) For the purposes of this Division, *paternity leave* is:
 - (a) a single, unbroken period of unpaid leave (*short paternity leave*) of up to one week taken by a male employee within the week starting on the day his spouse begins to give birth; or
 - (b) a single, unbroken period of unpaid leave (*long paternity leave*), other than short paternity leave, taken by a male employee after his spouse gives birth to a living child so that the employee can be the child's primary care-giver.

This legislation specifically excludes people in same-sex couples.

Recommendation: That the Workplace Relations Amendment (Work Choices) Act 2005 be amended to remove gender-specific references in the definition of 'de facto spouse'.

2. Social security benefits

As the Commission's Discussion Paper states, there are some social security payments which are only paid to couples. A person is a member of a couple, according to the definitions contained in the Social Security Act (1991), if 'the person is living with a person of the opposite sex'⁴. This definition excludes same-sex couples, who may be assessed as single people for the purposes of income or asset tests.

We acknowledge that in some situations this may actually benefit people in same-sex relationships. However, the negative impact of changes on people receiving social security payments is potentially great. For instance, over 50% of people living with HIV/AIDS report pensions and benefits as their primary source of income⁵. These are particularly vulnerable members of the community. Any measures to rectify this anomaly should therefore be designed to minimise the impact on welfare recipients.

3. Tax concessions

As the Commission's Discussion Paper notes, the definition of spouse used in the Income Tax Assessment Act 1936 excludes same-sex couples. The effect of this is that people in same-sex relationships cannot claim a number of rebates to which people who are legally married or living in heterosexual de facto relationship are entitled. These include the dependent spouse rebate, pensioner rebates and childcare rebates.

The following case study shows the way these provisions affect ordinary Australians.

Case Study 1: Samantha and Annie

In 2004-2005 Samantha earned \$59,800 from her job as a journalist. Her partner Annie worked one day a week at the local newsagent. They live together with Annie's two children from a previous relationship, Lucy aged 6 and Justin aged 4. Both contribute to the cost of raising the children, while the children's father does not. With Lucy starting school this year, Annie has found a part-time job as a medical receptionist. She plans to place Justin in childcare while she and her partner are at work.

⁴ *Social Security Act 1991 No. 46, 1991, Section 4.2 (b) (i)*

⁵ Grierson, J. *et al* (2004) '*HIV Futures 4: State of the [positive] Nation*', The Living With HIV Program, Australian Research Centre in Sex, Health and Society.

Samantha and Annie's relationship is not recognized for tax purposes. Although Samantha effectively supports the family on her salary, she is not able to claim the dependent spouse rebate for her partner, even though Annie's income fell below the threshold of \$6,569. Nor can she claim any rebates for the children's medical expenses, though she is able to claim the Family Tax Benefit Part A. When Annie increases her working hours, she is able to claim child care benefit. However, Samantha will not be able to claim the child care tax rebate for any childcare expenses that she pays, which would provide her with a 30% rebate on her out-of-pocket childcare expenses.

This case study highlights the inconsistencies in legislation affecting entitlements for people living in same-sex relationships.

Recommendation: *That the definition of 'spouse' contained in the Income Tax Assessment Act 1936 be amended to include same-sex partners.*

4. Medicare and the Pharmaceutical Benefits Scheme

The Medicare Safety Net and the Pharmaceutical Benefits Scheme (PBS) Safety Net are designed to assist people with meeting high medical expenses. This initiative is particularly important for people living with HIV/AIDS, who typically have high medical and pharmaceutical costs. Under current legislation, however, different thresholds apply to single people and families. The definitions of 'spouse' and 'de facto spouse' do not include people in same-sex relationships. This can have a discriminatory effect on people seeking to access healthcare.

Here is an example:

Case Study 2: Craig and Michael

Craig earns \$42,000 a year from his job in a bank. He has HIV and also suffers from depression. His partner Michael earns \$82,000 a year at his job in IT. Craig's medical and pharmaceutical expenses are substantial. He takes antiretroviral therapy to manage HIV, and sees his GP on a regular basis. He also takes antidepressants and sees a psychiatrist on a monthly basis. Michael also sees a psychiatrist regularly, as he suffers from stress.

Craig and Michael pay tax at the single rates. They are not entitled to any concession. Michael is not entitled to claim the net medical expenses tax offset, which would give him a 20% rebate on medical expenses that he has paid on his partner's behalf. Nor are Craig and Michael able to register as a family for the purpose of claiming the Medicare Safety Net or the PBS Safety Net threshold. This would entitle them to a refund of 80% of their out-of-pocket medical expenses once their combined out-of-pocket medical expenses reached a threshold of \$500. Instead the Medicare Safety Net threshold of \$1,000 for a single person applies to both of them. This effectively means a safety net threshold of \$2,000 a year applies to Craig and Michael, and costs them \$1,500 a year.

Nor are they eligible to register as a family for the PBS Safety Net. If they were considered a family, the PBS Safety Net would kick in once they had spent \$960.10 between them on medications. Instead, as 'single' people they must each spend \$960.10 before the threshold applies. This effectively costs Craig and Michael another \$960.10 a year.

In this situation, the Medicare Safety Net, which is 'designed to help when you need it most', appears to fail the very people it is intended to assist.

Recommendation: *That the Commission make recommendations to the effect that the definition of 'de facto spouse' contained in the Health Insurance Act (1973) be amended to include same-sex partners.*

5. Superannuation entitlements

The recent changes to Commonwealth legislation applying to private superannuation funds (the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004) enabled people in same-sex relationships to nominate their partner to receive their superannuation benefits when they die. This is commendable and had been called for by gay and lesbian and human rights organisations for some time. However, the amendment applies only to private superannuation schemes and does not apply to government and public sector employees. While most State employees are covered by relevant State legislation in this area, members of Commonwealth superannuation funds are not. This is a glaring omission and potentially affects a significant proportion of the workforce.

Case Study 3: Greg and Vince

Greg was making \$45,000 a year from his job in sales. His partner Vince worked in the public service for several years but was eventually forced to give up work because of poor health. Vince then received the Disability Support Pension. Vince claimed the Disability Support Pension at the single rate of \$499.70 a fortnight, with a pharmaceutical allowance of \$5.80 a fortnight. In fact this gave him a larger payment than it would have if he and Greg were assessed as a couple. Most of Vince's medical expenses were covered by his Pensioner Health Care Card.

However, last year Vince's health deteriorated sharply, as he developed AIDS dementia complex and then pneumonia. Greg gave up work to care for his partner, claiming Carer Payment while he was not working.

Unfortunately Vince died without leaving a will. Vince's family, from whom he was estranged, are legally recognised as beneficiaries of his estate. Greg is able to challenge this ruling in court, but must prove that he and Greg were in fact in a 'dependent' relationship. Further, as a former employee of the Australian Public Service, the rules governing Vince's superannuation did not allow him to nominate Greg as a beneficiary. Still grieving over his partner's death, and with his savings already depleted, Greg was required to take costly and stressful legal action over Vince's estate.

The situation here is an anomaly created by the failure to apply the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 to government-owned funds. It appears contrary to the government's intention to provide equality to same-sex couples in relation to superannuation benefits.

Recommendation: *That the government legislate to make the provisions of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004 applicable to public superannuation funds as well as private funds.*

6. Workers' compensation

The Safety, Rehabilitation and Compensation Act 1988 regulates workers compensation for employees of the Australian Government, through the Comcare scheme. The definition of 'spouse' contained in the Act includes dependents of the employee, including:

the spouse, father, mother, step-father, step-mother, father-in-law, mother-in-law, grandfather, grandmother, son, daughter, step-son, step-daughter, grandson, grand-daughter, brother, sister, half-brother or half-sister of the employee.

Yet it does not include same-sex partners. With over 100,000 people employed by the Australian Public Service, this anomaly within the legislation has the potential to affect significant numbers of Commonwealth employees.

Recommendation: *That the definition of 'dependent' in the Safety, Rehabilitation and Compensation Act 1988 be amended to include same-sex partners.*

7. Veterans pensions and entitlements

As the Commission's Discussion Paper notes, this applies to a range of entitlements detailed in the Veterans Entitlements Act 1986, including pensions and medical benefits and pharmaceutical benefits. This was tested in the case of *Young v Australia* and found to be a violation of Article 26 of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory.

The ruling made by the UN Human Rights Committee clarified that Article 26 of the ICCPR does indeed apply to discrimination on the basis of sexuality or sexual orientation. As such, this ruling has significant implications which go beyond the specific case of *Young v. Australia* and the *Veterans Entitlements Act 1986*. The Committee's ruling implies that any legislation which denies entitlements to people in same-sex couples may constitute a violation of human rights.

However, the Australian Government essentially reiterated its original position in the *Military Rehabilitation and Compensation Act 2004*, which provides for compensation to be paid to dependents on the death of a member of the defence

forces. The *Military Rehabilitation and Compensation Act 2004* defines a 'partner' as 'a person of the opposite sex to the member'⁶.

Recommendation: *That the definition of 'partner' contained in the Veterans' Entitlements Act 1986 be amended to include same-sex partners.*

Recommendation: *That the definition of 'partner' contained in the Military Rehabilitation and Compensation Act 2004 be amended to include same-sex partners.*

8. Parliamentary entitlements

The entitlements enjoyed by federal members of parliament are regulated by the Parliamentary Entitlements Act (1990). The definition of spouse in the Act 'includes a person who is living with the member as the spouse of the member on a genuine domestic basis although not legally married to the member'. This definition does not specifically exclude same-sex partners but has been interpreted to exclude them. While the Parliamentary Entitlements Act (1990) clearly does not affect large numbers of Australians, the principle of equality should apply nonetheless.

Recommendation: *That the definition of 'spouse' in the Parliamentary Entitlements Act should be amended to include same-sex partners.*

9. Judicial pensions

As Justice Michael Kirby points out, the Judges Pensions Act (1968) remains 'resolutely unchanged'⁷, despite legislation to eliminate discrimination in other areas. The Judges Pensions Act entitles a surviving spouse to a portion of a judge's pension upon his or her death. The definition of 'spouse' contained in the Act includes someone who is in a 'marital relationship', but does not apply to same-sex partners (though this may be contestable). This follows the pattern of tying entitlements for partners to a definition of 'spouse' as in other legislation.

Recommendation: *That the definition of 'marital relationship' contained in the Judges Pensions Act 1968 be amended to include same-sex relationships.*

10. Inheritance

Legislation relating to inheritance comes under State jurisdiction. Most States, with the notable exception of South Australia, have already passed legislation to eliminate discrimination against same-sex couples in relation to inheritance.

⁶ *Military Rehabilitation and Compensation Act 2004*, Section 5.

⁷ Kirby, M. (2005) 'Sexuality and Australian Law', *Journal of Homosexuality*, 48, 3-4, pp. 31-48.