

Submission to the Human Rights and Equal Opportunity Commission

“Same-Sex: Same Entitlements”

Introduction

1. Australian Lawyers for Human Rights Inc (ALHR) is a national network of Australian lawyers active in practising, and promoting awareness of, human rights law in Australia. ALHR’s membership of over 1,000 has active national, State and Territory committees.
2. ALHR thank the Commission for the opportunity to make this written contribution to the national inquiry into discrimination in financial and work-related entitlements and benefits against people in same-sex relationships. ALHR notes the Commission intends to host public forums and would welcome the opportunity to comment orally at future forums.
3. ALHR congratulates the Commission for undertaking this inquiry and on the quality of the discussion paper.

Background

4. The Commission has called for submissions to identify which Commonwealth, State and Territory laws discriminate against same-sex couples and any children of same-sex couples in the context of financial and work related entitlements. The Commission has also requested that submissions provide recommendations as to how the discrimination identified could be rectified so that Australia complies with its international human rights obligations under the International Covenant on Civil and Political Rights (ICCPR), Convention on the Rights of the Child (CRC) and International Labour Organisation Discrimination (Employment and Occupation) Convention (ILO111).

Australia’s human rights obligations under the ICCPR, CRC and ILO 111

5. The principle of non-discrimination forms a fundamental basis for the international human rights system. It is enshrined in the Declaration of Human Rights (Arts 2, 7 and 10), the International Covenant on Civil and Political Rights (arts 2, 3, 14, 25 and 26), the International Covenant on Economic Social and Cultural Rights (Art 2) and the Charter of the United Nations (Arts 1(3) and 55). The principle of non-discrimination has a broad application and scope and encompasses the principles of equality before the law, equality before courts and tribunals and the right to equal protection of the law.
6. As a signatory to the ICCPR, Australia is obliged to ensure that all Australians have the right to non-discrimination. This includes discrimination on the basis of

“sex” or “other status”. Australians similarly have the right to “equality before the law” regardless of “sex” or “other status” under Articles 2 and 26.

7. The Human Rights Committee has explicitly stated that the rights granted in Article 26 includes discrimination on the grounds of sexual orientation.¹ Similar determinations have been made by the Committee on Economic, Social and Cultural Rights² and the Committee on the Rights of the Child.³
8. To comply with these obligations, all jurisdictions in Australia must ensure that their laws do not discriminate against people in same-sex relationships either directly or indirectly, or degrade those persons because of their status as a person in a same-sex relationship.
9. Australia’s obligations under Article 26 of the ICCPR have already received international investigation by the Human Rights Committee in *Young v Australia*⁴. In that Communication, the Committee found that Australia had breached its obligations under Article 26 by denying Mr Young a pension he would otherwise have been entitled to had he been in heterosexual marriage, on the basis of his sexual orientation.
10. ALHR submits that the Australian Government remains in breach of that finding as the legislative changes requested to the *Veterans Entitlements Act 1986* by the Human Rights Committee in 2000 have still not been made.
11. ALHR submits that the relevant obligations under the CRC in relation to discrimination against same-sex couples in areas of financial and work entitlements includes Article 2(2) but also Articles 7, 9, 27 and 28 (as detailed below).
12. ALHR submits that the relevant obligations under the ILO 111 as incorporated into the *Human Rights and Equal Opportunity Act* and Regulations requires all Australian jurisdictions to ensure people in same-sex relationships have equal opportunity and treatment in respect of employment and occupation.
13. ALHR notes that the impact of discrimination on people in same-sex relationships is wide-reaching and can have significant implications beyond any damage caused where benefits and entitlements are refused. Specifically, discrimination on the grounds of sexual orientation may give rise to a variety of other human rights violations including the right to privacy, freedom of opinion, freedom of assembly, freedom of conscience, freedom of association, right to work, right to social security, right to education and right to adequate housing.
14. In order to eliminate discrimination, ALHR submits that same-sex couples must have access to the same benefits and entitlements as heterosexual couples in the same circumstances under the relevant legislation.

¹ Human Rights Committee, Communications: Australia, CCPR/C/50/d/488/1992, April 4, 1994, paras. 8.1-8.7

² See for example, General Comment No 15, E/C.12/2002/11, 20 January, 2002, para. 13

³ See for example, General Comment No 4, CRC/GC/2003/4, 1 July, 2003, para. 6

⁴ (941/00) at [10.4].

Which Laws Discriminate?

15. There are several thousand pieces of legislation at the Commonwealth, State and Territory level. ALHR believes that the task of considering each and every one of those laws to identify which potentially discriminate against same-sex couples and their children is not a task which we or other non-government organisations have the resources to complete.
16. Notwithstanding the above, ALHR was able to identify one jurisdiction in Australia where all discrimination in legislation against people in same-sex relationships has been eliminated; the ACT. Our task of reviewing ACT law was straightforward as in 2003, the ACT Government undertook a review of all ACT legislation with a view to removing discrimination against gay, lesbian, bisexual, transgender and intersex people. In 2003 and 2004, a raft of amendments were made to modify offending laws. The ACT *Civil Union Act 2006* passed by the ACT Government on 11 May 2006 was a crucial step in this reform process.
17. ALHR is advised that the process of identifying and rectifying discriminatory ACT laws was undertaken by a team within an ACT Government Department and involved broader community consultation. ALHR submits the same process could and should occur on a National level. ALHR considers that this task should be conducted by a dedicated inter-governmental taskforce, headed by the Commission.
18. ALHR notes the ACT *Human Rights Act 2004*, although outside the Commission's legislative scope, is the basis upon which ACT laws are assessed and ALHR believes it is the standard which all other jurisdictions should aim to achieve.
19. While ALHR submit that the task of identifying all potentially discriminatory laws requires a specialised taskforce, it wishes to highlight some areas which are of particular significance and which demonstrate the multifaceted effects of discrimination against people in same-sex relationships.
20. The Commission's Discussion Paper usefully highlighted a number of Commonwealth laws which, in ALHR's submission, offend the ICCPR, CRC and ILO 111. In almost all respects the discrimination is direct: legislative definitions deny the application of benefits or entitlements to people in same-sex relationships and their children.
21. ALHR notes that laws governing access to financial and work-related entitlements and benefits generally define who in an 'eligible' relationship in two key ways: by recognising parties who have 'opted-in' to the institution of marriage; and by 'presuming' that certain parties are in a marriage-like relationship.
22. The 'opt-in' institution of marriage involves parties choosing to make a legally-recognised commitment to one another, which includes the assumption of specific rights and responsibilities.

23. In contrast, ‘presumptive’ legislation imposes legally-significant family structures upon couples without their explicit consent. Legislation in all Australian jurisdictions attaches legal rights and responsibilities to partners on the basis that they are in a ‘de facto’ marriage-like relationship. In this context, whether a couple is presumed to be in a marriage-like relationship is determined by reference to a number of factors including the duration and social nature of the couple’s relationship, their degree of financial interdependence and their joint care of children.
24. In contrast, opt-in mechanisms such as marriage, or the relationship registration schemes provided by Tasmania’s *Relationship Recognition Act* 2003 and the ACT’s *Civil Union Act* 2006, confer immediate rights and responsibilities upon the parties involved. Opt-in mechanisms give partners the legal certainty that they will be able to access specific financial and work-related entitlements and benefits without having to provide proof of their relationship to the relevant decision-maker.
25. In order to remove discrimination against same-sex couples in relation to financial and work-related entitlements and benefits, ALHR submits that State, Territory and Federal governments must address discrimination at both the presumptive and ‘opt-in’ levels.
26. In preparing this submission, ALHR considered laws in the areas of social security, tax concessions and rebates, health and pharmaceutical benefits concessions, veterans benefits and industrial relations. ALHR found that the definition of who is in an ‘eligible relationship’ differed between legislation. Many areas of Federal legislation continue to exclude same-sex relationships, including Federal worker’s compensation, taxation, social security, parenting and family law and marriage law. Similarly many laws in the States and the Northern Territory discriminate against same-sex couples by using marriage and criteria-based de facto relationship definitions which discriminate on the basis of gender.
27. In the legislation considered, relationship terms included: “partner”, “member of a couple”, “spouse”, “dependent” and “de facto”. Whilst it is not practical to examine all of these definitions in detail, ALHR will highlight three different examples of direct discrimination which flow from criteria-based de facto relationship definitions which fail to confer “equal treatment before the law” to people in same-sex relationships.
28. The Commonwealth *Social Security Act* 1991 confers benefits to “members of a couple”. The relevant aspects of the legislation are found at part 4, section 4:

Section 4 Member of a couple—general

4(2) *Subject to subsection (3), a person is a **member of a couple** for the purposes of this Act if:*

(a) the person is legally married to another person and is not, in the Secretary’s opinion..., living separately and apart from the other person on a permanent or indefinite basis; or

(b) all of the following conditions are met:

- (i) *the person has a relationship with a person of the opposite sex (in this paragraph called the partner);*
- (ii) *the person is not legally married to the partner;*
- (iii) *the relationship between the person and the partner is, in the Secretary's opinion...a marriage-like relationship;*
- (iv) *both the person and the partner are over the age of consent applicable in the State or Territory in which they live;*
- (v) *the person and the partner are not within a prohibited relationship for the purposes of section 23B of the Marriage Act 1961.*

Member of a couple—criteria for forming opinion about relationship

4(3) *In forming an opinion about the relationship between 2 people for the purposes of paragraph (2)(a) or subparagraph (2)(b)(iii), the Secretary is to have regard to all the circumstances of the relationship including, in particular, the following matters:*

(a) the financial aspects of the relationship, including:

- (i) *any joint ownership of real estate or other major assets and any joint liabilities; and*
- (ii) *any significant pooling of financial resources especially in relation to major financial commitments; and*
- (iii) *any legal obligations owed by one person in respect of the other person; and*
- (iv) *the basis of any sharing of day-to-day household expenses;*

(b) the nature of the household, including:

- (i) *any joint responsibility for providing care or support of children; and*
- (ii) *the living arrangements of the people; and*
- (iii) *the basis on which responsibility for housework is distributed;*

(c) the social aspects of the relationship, including:

- (i) *whether the people hold themselves out as married to each other; and*
- (ii) *the assessment of friends and regular associates of the people about the nature of their relationship; and*

- (iii) *the basis on which the people make plans for, or engage in, joint social activities;*
 - (d) *any sexual relationship between the people;*
 - (e) *the nature of the people’s commitment to each other, including:*
 - (i) *the length of the relationship; and*
 - (ii) *the nature of any companionship and emotional support that the people provide to each other; and*
 - (iii) *whether the people consider that the relationship is likely to continue indefinitely; and*
 - (iv) *whether the people see their relationship as a marriage-like relationship.*
29. The above definition of “members of a couple” includes a complex and highly subjective criteria for determining if two people are in an eligible relationship. However, part 4(2)(b)(i) expressly prohibits same-sex couples from satisfying the test, removing their eligibility for entitlements.

30. The second example ALHR wishes to highlight is found in *A New Tax System (Medicare Levy Surcharge – Fringe Benefits) Act 1999*. This legislation confers benefits to “de facto couples” and treats them as if married. A relevant aspect of the legislation is found at section 7:

De facto couples treated as if married

- (1) *This Act applies to a man and a woman who have lived together as husband and wife on a bona fide domestic basis for a period, although not legally married to each other, as if:*

(a) *they were married to each other for the period; and*

(b) *neither of them were married to anyone else for the period.*

31. Again the definition includes gender-based criteria for determining whether an eligible de facto relationship exists. Again, the test expressly denies equal treatment to persons in same-sex relationships.

32. A further example is the definition of “partner” in the Veterans’ Entitlements Act 1986 where the Human Rights Committee found that the legislative provisions discriminated against same-sex couples.

5E Member of a couple—general

- (2) *A person is a member of a couple for the purposes of this Act if:*

(a) *the person is legally married to another person and is not living separately and apart from the other person on a permanent basis; or*

(b) *all of the following conditions are met:*

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

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

(iii) *the person and the partner are, in the Commission's opinion (formed as mentioned in section 11A), in a marriage-like relationship;*

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

33. This definition of 'partner' differs from those set out above in relation to tax and social security. However, it has the same effect, namely, excluding persons in a same-sex relationship from accessing the prescribed benefits and thus denying them equal treatment before the law.
34. ALHR submits that excluded same-sex couples from definitions of what constitutes a relationship is unequal treatment and discrimination. There is jurisprudence addressing a range of issues to support this submission. For example, in *NIB Health Funds Ltd v Hope & Anor* in the Supreme Court of NSW, McInerney J upheld a Tribunal decision that NIB unlawfully discriminated against a same sex couple and their child by denying "family coverage" premiums for health insurance. McInerney J held it was an invalid application of the term 'dependent' to exclude a gay couple and their child from coverage under the family policy.⁵
35. ALHR believes that variations in criteria-based definitions of de facto relationships create an indefensible level of inconsistency. ALHR submits that the simplest way to achieve equality for same-sex couples would be to remove discrimination from all definitions of relationships.
36. The NSW *Property (Relationships) Act* 1984 and the ACT *Domestic Relationships Act* 1994, along with De facto legislation in Queensland, Victoria, Western Australia, the Northern Territory and Tasmania all provide possible models for non-discriminatory de facto relationship definitions.
37. Further, to remove the discriminatory impact of these legislative frameworks, ALHR submits that all legislation containing criteria-based relationship definitions should be amended to reflect a definition which includes same-sex relationships. This action would address the current discrimination experienced by same-sex couples concerning their eligibility for a range of Federal, Territory and State-based financial and work-related entitlements and benefits.

⁵ *NIB Health Funds Ltd v Hope and Anor* 30060/95 NSWSC per McInerney J, 15 November 1996 Unreported. See also judgement of Thomas J in *Quilter v Attorney General* [1998] 1 NZLR 523.

38. Finally, ALHR submits that the current lack of uniformity concerning the grounds for discrimination including sexual orientation is unacceptable and not in conformity with current international human rights legal standards. Federal Anti-Discrimination legislation should be amended to include sexual and gender orientation as an additional prohibition.
39. As mentioned above, there are a number of instances where legal discrimination against same-sex couples is indirect, and has flow on effects for the rights of children of those relationships. Such rights are provided for in the CRC.
40. Article 7 of the CRC states that every child has the right to be registered immediately after birth through a document that details his or her age and family affiliations. To comply with this obligation, all Australian jurisdictions should recognise same sex couples parenting rights. This would allow for birth certificates to include the names of both of a child's parents, regardless of gender. This is already possible in the ACT and Western Australia.
41. Parenting presumptions regarding children born through assisted conception procedures in the *Family Law Act 1975* (Cth) and in State and Territory legislation should also be amended to remove discrimination against same-sex partners.
42. Further, adoption laws should be amended to remove gender-based discrimination. Currently, only three jurisdictions, WA, ACT and Tasmania currently provide for adoption by the same-sex partner of a biological parent.⁶
43. Article 9 of the CRC states that children have the right to "know and be cared for by his or her parents." To comply with this obligation, all Australian jurisdictions should ensure that both of a child's parents are legally recognised and thus have the legal authority to make decisions on behalf of their child in areas such as discipline, education and health-care. In general, a child's right to parental care is also supported by workplace allocation of parental leave and government child-care allowances, which assist working parents to arrange care for their children. However, discriminatory legislative definitions such as those discussed above continue to deny same-sex couples access to such leave entitlements.
44. Article 9 of the CRC also requires States to safeguard children's right to contact with both parents upon relationship breakdown. The Federal Government's recent amendments to the *Family Law Act 1975* place a renewed emphasis on the importance a child maintaining a meaningful relationship with both of his or her parents following relationship breakdown. Yet upon the breakdown of a same-sex relationship, the *Family Law Act 1975* fails to recognise a non-biological co-parent as falling within the legal definition of a parent. This impacts on issues concerning a child's right to contact with their non-biological co-parent.
45. Article 27 of the CRC states that every child has the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. To comply with this obligation all Australian jurisdictions should ensure that

⁶ Adoption Act 1993 (ACT) s 18(3); Adoption Act (Tas) s 20(2A); Adoption of Children Act 1994 (WA) s 67(1).

financial entitlements currently available to opposite-sex couples and their children in areas including social security, superannuation, worker's compensation and statutory victim compensation schemes are also available to same-sex couples and their children. The funds provided by these schemes are crucial to a family's ability to maintain an adequate standard of living, particularly in times of crisis.

46. Article 28 requires States to secure financial maintenance for a child from his or her parents where separation or divorce occurs. To fully comply with this obligation, the Commonwealth Government should ensure that same-sex parents are recognised by the *Child Support Assessment Act 1989* (Cth) to ensure that a child's primary care-taker is able to claim financial support to assist in caring for the child upon a relationship breakdown.
47. ALHR submits that a commitment to children's rights requires State, Territory and Federal government to recognise that children's rights are diminished whenever legislation refuses to recognise a child's relationship with both of his or her parents and the parents' relationships with one other.

Recommendations

48. ALHR recommends the establishment of an inter-governmental taskforce to identify all Commonwealth, State and Northern Territory legislation which directly or indirectly discriminates against same-sex couples and/or their children. Priority should be given to identifying definitions including spouse, partner, defacto or marriage-like relationship which exclude same-sex relationships. ALHR believes the Commission is well placed to head the taskforce.
49. ALHR recommends that a common criteria-based definition of marriage-like relationships be devised and adopted across all Commonwealth, State and Northern Territory legislation. This definition should not discriminate on the basis of sexual orientation.
50. ALHR recommends that the Federal government implement an 'opt-in' relationship recognition or civil union scheme in order to comply with their international obligations under the principal of non-discrimination.
51. ALHR recommends that Federal and all applicable State and Territory anti-discrimination legislation be amended to include sexual orientation as a prohibited ground for discrimination.
52. ALHR recommends that all State and Territory birth registration systems and parenting presumptions be amended to recognise a child's same-sex parents.
53. ALHR recommends that adoption legislation be amended to facilitate adoption by the same-sex partner of a child's biological parent.