

SUBMISSION BY
MEDIA, ENTERTAINMENT & ARTS ALLIANCE
TO
HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
REGARDING
NATIONAL INQUIRY INTO DISCRIMINATION AGAINST PEOPLE IN
SAME-SEX RELATIONSHIPS
SAME-SEX: SAME ENTITLEMENTS
FINANCE AND WORK-RELATED ENTITLEMENTS AND BENEFITS

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The Media, Entertainment & Arts Alliance

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

The Media, Entertainment & Arts Alliance appreciates the opportunity to make a submission to the National Inquiry into Discrimination against People in Same-Sex Relations: *Same-Sex: Same Entitlements* (Inquiry) being undertaken by the Human Rights and Equal Opportunities Commission (HREOC).

The Alliance supports the principles contained in the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child* and the *Discrimination (Employment and Occupation) Convention 1958*.

The Alliance is concerned that legislation exists in Australia that does not afford the same rights to persons in same-sex relationships and consequently to their children as is the case for those Australians living in heterosexual relationships and their children.

The “right to non-discrimination and the right to equality before the law are fundamental principles of international human rights law” that should apply equally regardless of whether a person is homosexual or heterosexual.

In 2004, the Australian Parliament passed the *Marriage Amendment Act 2004* largely to address the fact that the *Marriage Act 1961* did not contain a definition of marriage. The Attorney-General explained the need for the Bill as follows: “This bill is necessary because there is significant community concern about the possible erosion of the institution of marriage. The parliament has an opportunity to act quickly to allay these concerns.” The definition of marriage adopted provides that marriage is “The voluntary union for life of one man and one woman, to the exclusion of all others.”

Evidence supporting the community concern about the possible erosion of the institution of marriage and reasons for the need to move quickly was articulated. At the time the *Marriage Act* was introduced the parliament made the decision that it was not necessary to define marriage. Since 1961 community attitudes to same-sex relationships have been transformed.

By adopting the definition of marriage set out in *Hyde v Hyde and Woodmansee*, the parliament set in concrete a definition articulated in 1866. It is a definition that defies international trends.

At the time the legislation was passed into law in Australia, same-sex marriage was already lawful in the Netherlands and Belgium, in Ontario and British Columbia in Canada, and in Massachusetts in the United States. Registered partnerships granting homosexual couples the same – or virtually the same – legal rights as married heterosexuals existed in France, Germany, Finland, Iceland, Sweden, Denmark and Norway and were under active consideration in Britain, Ireland, Switzerland, the Czech Republic and New Zealand.¹

Since that time, Spain has legislated for same-sex marriage. The Supreme Court of the State of New York has found that “the institution of marriage has steadily evolved beyond a static ‘historical definition’ and, as a result, should be open to same-sex couples”.² In the United Kingdom same-sex couples are now able to make legal commitments through a civil partnership registration procedure and similar changes have been introduced in New Zealand.³

Ironically, the Financial Impact Statement included in the Explanatory Memorandum for the *Marriage Legislation Amendment Bill 2004* notes “There is no financial impact from this Bill.” Whilst there

¹ *Marriage Legislation Amendment Bill 2004 Bill Digest No. 155 2003-04*, pages 19 and 20, available online at www.austlii.edu.au.

² *The Legal Regulation of Marriage*, the Hon Alastair Nicholson AO, Melbourne University law Review, page 10, available online at www.austlii.edu.au/journals/MULR/2005/17.html.

³ *The Legal Regulation of Marriage*, the Hon Alastair Nicholson AO, Melbourne University law Review, page 11, available online at www.austlii.edu.au/journals/MULR/2005/17.html.

might be no direct financial impact for the government, there remains an ongoing financial impact for those in same-sex relationships and their children.

The Alliance believes the *Marriage Amendment Act 2004* needs to be amended to remove the ongoing discrimination faced by those in same-sex relationships. As The Hon Alastair Nicholson has observed, “This discrimination against same sex couples embodied in the Act seems to me to run contrary to principles of humanity and decency ... And to what gain? Legal denial and intolerance achieve nothing but an insult to the dignity of recognition that every family treasures and has the right to expect in a country which supposedly supports tolerance for peaceful differences among its members. To continue to ignore the rights of same-sex individuals and their relationships is a pyrrhic achievement of which no government ought to be proud. Denying someone the right to be known as a committed partner to a relationship, simply on the basis of the gender of the partners, is no different to apartheid.”⁴

In addition to the *Marriage Amendment Act 2004*, as the HREOC Discussion Paper notes, there are a number of Commonwealth laws “that exclude same-sex couples for no readily apparent reason.”⁵

At the time of writing, notwithstanding the fact that ACT Liberal Senator Gary Humphries crossed the floor to vote with the opposition, Senators have just voted 32-30 to reject a motion which would have disallowed a regulation signed by the Governor General allowing the Government to exercise its power to overturn the civil unions’ legislation in the Australian Capital Territory.

The implications of the manner in which marriage is defined have trickle down effects through other legislation where entitlements are tied to the nature of the marital, de facto or same-sex relationship status of the person/s to whom the relevant legislation applies.

The Alliance supports the removal of all legislative barriers preventing those in same-sex couples from enjoying the same benefits as those in de facto relationships and marriages. Financial and work related entitlements and benefits should not, in the interests of supporting the human rights of all, be constrained in any way by reference to a individual’s personal relationship status.

Workplace Leave and other Entitlements

The awards and agreements to which the Alliance is a party do not discriminate against persons in same-sex relationships. Rather, they define workplace leave – including maternity, paternal, adoption and carer’s leave – and other entitlements as entitlements regardless of the sex or sexual preference of the employee and regardless of whether the employee is single, married, in a de facto heterosexual relationship or a same-sex relationship.

However, whereas one of the objects of the *Workplace Relations Act 1996* is to help “prevent and eliminate discrimination on the basis of ... sexual preference”⁶, like HREOC, the Alliance is concerned that changes to the Act introduced in the *Workplace Relations Amendment (Work Choices) Act 2005* discriminate against people in same-sex relations, including in respect of paternity leave.

Of further concern is that, whilst the *Workplace Relations Act 1996* makes it unlawful for a person’s employment to be terminated on the basis of the person’s sex or sexual preference, the removal of unfair dismissal laws is likely to increase the potential for homophobic employers to terminate employees on the basis of their sexual preference than was the case when reasons for termination were required to be made explicit.

⁴ *Denying equality smacks of apartheid*, Alastair Nicholson, Online Opinion, 13 June 2006, available www.onlineopinion.com.au/view.asp?article=4541.

⁵ *Same-Sex: Same Entitlements, National Inquiry into Discrimination against People in Same-Sex Relationships – Financial and Work-Related Entitlements and Benefits*, Discussion Paper, Human Rights and Equal Opportunity Commission, April 2006, page 12.

⁶ *Workplace Relations Act 1996*, s3(m).

Social Security Benefits

The work undertaken by many, if not most, Alliance members is of a short term, freelance or casual nature. Levels of unemployment are considerably higher amongst certain classes of members, such as actors, than is the case for most other professions. That this is so reflects structural necessities peculiar to the entertainment industry and is common to entertainment industries world-wide.

Others industries in which Alliance members work, such as journalism, are undergoing dramatic structural change in the wake of rapid technological change. Employment that once was characterised by full-time permanency is increasingly characterised by employment of a short-term freelance nature.

Unavoidably, many Alliance members need the safety net that social security benefits provide. However, and again as noted in the HREOC Discussion Paper, the *Social Security Act* defines a partner as a member of a couple, but only if the two persons comprising the couple are of the opposite sex. As noted by HREOC, some benefits are restricted to members or former members of a couple as defined. Consequently, persons in same-sex relationships have restricted or no access to benefits that include partner bereavement payments and widow allowance, have restricted access to health care cards and pensioner concession cards and where a woman is in a same sex relationship she is treated differently in the respect of qualification criteria for an age pension on the death of her partner.

Tax rebates and medical concessions

As noted in HREOC Discussion Paper, those persons in same-sex relationships are not afforded equal treatment with those persons in heterosexual relationships with respect to a number of rebates including those in respect of dependents, medical expenses incurred by the taxpayer's dependents, pensioner rebates, child care rebates nor the variable rates that apply with respect to the Medicare levy.

Similarly, heterosexual couples are treated differently from same-sex couples under legislation dealing with the Pharmaceutical Benefits Scheme and Medicare safety nets.

Superannuation and Workers Compensation

Amendments in 2004 to the *Superannuation Industry (Supervision) Act 1993* for the most part afforded same-sex couples, other than Commonwealth employees, the same entitlements as those afforded to heterosexual couples.

However, some discrimination remains. For instance, the legislation does not allow recognition of same-sex partners in the event of death or total or partial disability, even if there exists an interdependent relationship.

Further, same-sex couples are not able to utilise the superannuation spousal contributions offset for tax purposes. Nor is it likely that same-sex couples will be able to utilise the benefits of superannuation splitting.

Whilst commending the steps made towards removing discrimination made in 2004, it is only reasonable that those in same-sex couples be afforded the same treatment afforded to those in heterosexual relationships.

Obviously it is time that Commonwealth employees were afforded the same entitlements in respect of superannuation as other Australians.

Just as Commonwealth employees in same-sex relationships are discriminated against in respect of superannuation, when covered by Comcare they are not entitled to the same workers compensation benefits as those in heterosexual relationships.

Conclusion

Notwithstanding the future of the Marriage Act 2004 or the introduction or otherwise of legislation recognising same-sex marriages or registered partnerships granting homosexual couples the same rights as heterosexual couples, the Alliance supports this move by HREOC to identify all legislation in all Australian jurisdictions that discriminates against those in same-sex relationships and looks forward to the timely removal of legislative discrimination wherever it exists.