Human Rights and Equal Opportunity Commission

Human Rights for Australia's Gays and Lesbians

February 1997

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An Occasional Paper of the Human Rights and Equal Opportunity Commission

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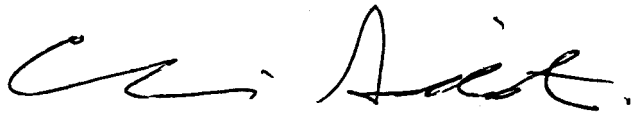
Foreword

Human rights are for all peoples - each woman, man and child - in all places and at all times. This is the fifth of a series of *Occasional Papers* to be published examining the application of human rights to a specific area of concern confronting Australian society.

The Human Rights and Equal Opportunity Commission has recognised and promoted for many years the human rights needs of all Australians. This paper is based on the Commission's submission to the Australian Senate Legal and Constitutional References Committee on the need to protect Australian citizens against discrimination and vilification on the grounds of their sexuality or trans-gender identity.

Policy officers contributing to the Commission's original submission to the Senate Committee on which this paper is based were Rosemary Grant, Andrew Larcos and Cara Seymour.



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February 1997

ISSN 0 642 25896 1

Human Rights and Equal Opportunity Commission, Sydney, 1997.

Design by Liam Gash
Printed by Westport Print Productions

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Introduction

Gay men and lesbians face widespread discrimination on the basis of their sexual orientation as do persons of trans-gender identity. The full realisation and protection of human rights and equality of opportunity require the adoption of positive measures to eliminate discrimination on the basis of sexual orientation and trans-gender identity.

International human rights obligations

Australia's international human rights obligations require Australia to take all necessary measures to eliminate discrimination, including discrimination on the grounds of sexual orientation and trans-gender identity.

By ratifying the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Labour Organisation Discrimination (Employment and Occupation) Convention 1958, Australia has undertaken to prohibit discrimination and to provide effective remedies against discrimination including on the basis of sexual orientation and trans-gender identity.

Non-discrimination and equality before the law

A number of provisions of the International Covenant on Civil and Political Rights (ICCPR) are directed at the elimination of discrimination and the promotion of equality. For instance, Article 2.1 provides that all rights in the Covenant apply equally to "all individuals". The requirement prohibits discrimination "of any kind" which affects the exercise or enjoyment of rights recognised in the ICCPR.

Article 2.1 requires Australia "... to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

In general terms, Article 2 requires that the civil and political rights provided for in the Covenant such as rights to liberty, freedom of thought, conscience, religion and belief and freedom of opinion, expression and information be guaranteed without discrimination of any kind.

Liberty and equality are the bases of human rights. The concept of equality contained in the ICCPR includes not only equality before the law but equal protection of the law and equal and effective protection against discrimination.

Decisions of the UN Human Rights Committee indicate that the obligation to respect and ensure the "equal protection of the law" is an obligation to prevent discrimination in the law, in the application of the law or in any action under the authority of law.

Sexual orientation, trans-gender identity and the ICCPR

Sexual orientation and trans-gender identity are not referred to as specific grounds of proscribed discrimination in the ICCPR. However the grounds are clearly included within its terms.

The general right to equality before the law and equal protection of the law requires that there be no discrimination in the administration of the law on any ground and that the provisions of the ICCPR should not be interpreted restrictively.

Australia accepts homosexuality as a status for the purposes of the Refugee Convention. It has included sexual orientation as a ground of discrimination under ILO 111 and in Australia's National Action Plan. All States and Territories with the exception of Tasmania and Western Australia have passed laws to prohibit discrimination on grounds that include sexual orientation.

Recently, the United Nations Human Rights Committee confirmed that sexual orientation is included in the provisions of the ICCPR. This decision related to an individual complaint submitted by Mr Nick Toonen to the Human Rights Committee in December 1991 that, as a result of sections of the Tasmanian Criminal Code which criminalises all forms of sexual intercourse between males, he was a victim of violations by Australia of Articles 2.1 (non-discrimination), 17 (privacy) and 26 (equality before the law) of the ICCPR. Essentially, the Committee found that Australia was in breach of Articles 2.1 and 17.

Persons of trans-gender identity also experience adverse treatment. Whether trans-gender identity is included in the various Articles of the ICCPR has not been specifically dealt with by the UN Human Rights Committee. However, existing jurisprudence and interpretation strongly support recognition of trans-gender identity as a status covered by the ICCPR.

The interpretation of "sex" by the Human Rights Committee supports the view that persons of trans-gender identity are covered by the specific ground of sex. This is also supported by recent decisions before the European Court of Justice.

State obligations

The primary obligation of States Parties to the ICCPR is to ensure realisation of the rights recognised in the Covenant and the promotion of non-discrimination and equality before the law through all appropriate measures, legislative, administrative and judicial. Failure to enact the necessary laws to ensure these rights or to provide an adequate remedy for violation of one of these rights is a violation of the ICCPR.

ILO Convention No. 111

The International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 ("ILO 111") which was ratified by Australia in 1973 prohibits discrimination in employment and occupation on certain specified grounds. Although the Convention does not proscribe sexual orientation as a prohibited ground of discrimination, it does provide that ratifying States may address discrimination on additional grounds. Australia has declared sexual preference as a ground of discrimination for the purposes of the ILO 111.

The Convention imposes positive obligations on Australia to take steps to ensure equal opportunity and non-discrimination in employment and occupation on the specified and declared grounds including sexual preference.

The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also contains provisions relating to the need for effective protection of human rights of people discriminated against on the basis of sexual orientation and trans-gender identity.

The ICESCR provides that States parties must guarantee that rights contained in its Articles be exercised without discrimination of any kind in areas including employment, housing, health and education.

Commonwealth powers

The Commonwealth has the power to legislate to give effect to international treaty obligations on the basis of its external affairs powers under s.51 (xxix) of the Constitution.

International concern about the protection of the rights of gays and lesbians is evident in the adoption of measures to prevent discrimination on the ground of sexual orientation in the European Union, the United States, Canada and New Zealand. Similar protection measures have also been adopted for persons of trans-gender identity in various European countries.

High Court decisions have established beyond doubt that the Commonwealth has power to legislate on matters of international concern, including to give domestic effect to Australia's international human rights obligations.

Existing protections in legislation

Current Federal, State and Territory law provides only limited protection against discrimination. The Human Rights and Equal Opportunity Commission has certain powers to inquire into any act or practice that may violate human rights or constitute discrimination. However, it is not unlawful to breach the human rights and principles of non-discrimination protected under the Commission's legislation and the Commission does not have the power to enforce its recommendations.

Other laws that provides some protection against sexual preference discrimination include the *Industrial Relations Act 1988* and the *Public Service Act 1922.*

The *Human Rights (Sexual Conduct) Act 1994* also provides limited protection requiring that sexual conduct between consenting adults not be subject to any arbitrary interference with privacy.

There is no uniformity among Australian States and Territories in legislative protection for gay men, lesbians and persons of trans-gender identity. Although legislation exists in respect of discrimination on the ground of sexual orientation in a number of States and Territories, major differences arise in terms of how sexuality is defined and whether presumed sexuality as well as actual sexuality is covered and in areas in which discrimination is outlawed and exceptions allowed.

In particular, there are differences in the range of exceptions and exemptions allowed for by each State and Territory with legislation. The most common areas of exemption include private education, employment in child care and churches and religious institutions. There is no legislative protection in either Western Australia or Tasmania. The situation can best be described as inadequate.

The legislative situation in relation to persons of trans-gender identity is particularly inadequate. Only New South Wales, South Australia, the Australian Capital Territory and the Northern Territory offer some limited form of legislative protection in this area.

Issues of discrimination against gay men and lesbians

The historic disadvantage suffered by homosexual persons has been widely recognised and documented. Discrimination continues to be their experience in employment, laws, policies and programs of government, access to services and exclusion from aspects of public life.

There is urgent need for Commonwealth action to outlaw discriminatory acts, practices and treatment to which gay men and lesbians are subjected. Extensive consultation with interested parties including gay men and lesbians themselves, government and non-government organisations, employer and employee organisations as well as State and Territory Governments is necessary before legislation is prepared.

Issues in employment and occupation

For many gay men and lesbians discrimination in employment and in the workplace is a significant issue. The Human Rights and Equal Opportunity Commission receives numerous complaints of discrimination based on sexual orientation in the workplace, harassment and unfair treatment. Breaches of confidentiality are a particular problem with many gay men and lesbians fearing exposure of their sexual orientation and the consequences. Complainants indicate that higher duties and overtime are often denied to gay men and lesbians. In extreme cases, gay men and lesbians have resigned or were forced to resign because of their sexual orientation.

Few employers have policies and procedures to protect workers against discrimination on the ground of sexual orientation. Harassment is often not taken seriously by heterosexuals. Assumptions about lesbians and gay men shape employer-employee and employee-employee relations in ways that lead to unfair treatment and a loss of rights even where there is no conscious discrimination.

The experience of anti-discrimination law in the workplace is that, once assumptions are deemed unacceptable and employees feel that their status cannot be an issue in promotion, hiring or firing, then those employees are much more likely to contribute their talents and efforts without constantly fearing exposure or harassment.

Superannuation

In most defined superannuation benefit schemes, such as the Australian Public Service schemes, a "spouse" may be paid either a lump sum payment or a pension or both if death or disablement of a contributor occurs before attaining the maximum retiring age. A "spouse" may also be paid a reversionary pension where a person in receipt of a pension under the scheme dies.

Entitlements under defined benefit scheme legislation depend on the contributor being survived by a "spouse". The *Commonwealth Superannuation Schemes Amendment Act 1992* eliminated discrimination on the basis of marital status by removing the discriminatory "dependency" requirement for an unmarried spouse. However the new definition requires the "spouse" to be living as "husband or wife" of the contributor.

In *Brown v Commissioner for Superannuation* the Commonwealth Administrative Appeals Tribunal held that the definition of "spouse" in the *Superannuation Act 1976* (Cth) s.8A, with its requirement of "living as husband or wife", did not include a same sex partner. The Tribunal reached this conclusion reluctantly stating "it gives us no joy to do so". The Tribunal considered there to be no doubt that the applicant Mr Brown and the deceased Mr Corva "had a close marriage-like relationship and that they conformed to the requirements of s.8A in all respects except for their gender". However it held that the legislation did not provide an entitlement to Mr Brown to the spouse benefit.

Payments by non-government superannuation funds are determined by the provisions of trust deeds. The trustees of these schemes can be given a discretion to pay death benefits to a same sex partner as either a spouse or a dependent. Superannuation funds must comply with the *Superannuation Industry (Supervision) Act 1993* ("the SIS Act") if they are to obtain the substantial tax concessions available to funds.

Section 62 of the SIS Act requires that the trustee ensure the fund is maintained solely for one or more core and ancillary purposes listed. One of those purposes is to provide death benefits in respect of a member of the fund to the member's legal representative or the member's dependents. Section 10 of the Act defines "dependent" to include spouse and child. "Spouse" is defined to refer to a person who lives with a person "on a genuine domestic basis as the husband or wife of the person".

In *Hope & Anor v NIB Health Funds Ltd* the NSW Equal Opportunity Tribunal considered that the notion of financial dependence substantially related to dependence on one another such as "with a joint tenancy, a joint mortgage,

pooled resources and shared debts".

A recent report of the Senate Select Committee on Superannuation noted that most fund trustees interpret sections 10 and 62 to exclude the payment of benefits to a same sex partner, even where that partner is the nominated beneficiary of the deceased. In addition competing claims from persons related to the deceased by blood or marriage are given preference. A same sex partner is usually not considered to satisfy the definition of dependent in section 10. Trustees who pay a death benefit to a same sex partner take the risk that their fund will be considered as not complying with section 10 of SIS and it will lose the significant associated tax concessions.

However, the Report noted that "dependent" as defined "includes" a spouse. This suggests that a person who is not a spouse but is nevertheless in a dependent relationship at the time of the member's death may fall within s.62. Theoretically, a same sex partner may be able to demonstrate that he or she was financially dependent upon the deceased contributor thus satisfying the SIS definition of "dependent". Although this would extend coverage it remains discriminatory. For heterosexual workers and their married or de facto partners, dependency is presumed.

The Report of the Select Committee states that the uncertainty surrounding the definition of dependent in the SIS Act "places a difficult burden on trustees and may place same sex partners in a situation of significant uncertainty as regards their respective entitlement. As such a situation is very likely to place those members at a disadvantage with respect to their capacity to make responsible financial plans for their future, failure to address this issue appears to run counter to the aim of providing greater certainty of retirement income".

Payments accrued as a consequence of death of a fund member may be received by a same sex partner through the deceased's estate. However, the taxation treatment of the payment in these circumstances is considerably less beneficial.

This situation is clearly unacceptable. Superannuation is a central component of retirement incomes policy. The superannuation regulations should be amended so that those in bona fide domestic relationships and single people are treated in the same manner as married and de facto superannuants.

Compensation

Similarly partners in same sex relationships do not fall within the definition of spouse in most employee compensation schemes. They are not entitled

to receive compensation otherwise payable to a spouse where death of a partner occurs as a result of an accident at work.

Leave and other entitlements

In many employment situations, gay men and lesbians do not receive the same leave and other entitlements as their heterosexual colleagues.

The provisions in most awards do not provide bereavement leave for same sex partners because of the definitions including the definition of spouse. Those provisions exclude benefits to some employees on the basis of sexual orientation. Some awards do include homosexual relationships as grounds for bereavement leave, for example, the Theatrical Employees' (Live Theatre and Concert) Award, but they are very much the exception.

Similar problems arise in relation to such entitlements as carers leave and compassionate leave. The provisions in many awards are based on a narrow definition of the family which does not include as "near relatives" (the term in which the entitlement to leave is often expressed) extended family and kinship relationships and same sex relationships. The problem in these cases is more widespread. The key issue is that an employment benefit is being provided on terms which restrict availability and under these circumstances is clearly discriminatory.

The *Public Service Act 1922* (Cth) prohibits discrimination on the basis of sexual orientation only where appointments, transfers and promotions are concerned. In the past same sex partners have been discriminated against in relation to travel and transfer entitlements, bereavement leave and expense allowances.

Examples of this discrimination include two recent cases where Commonwealth Government employees have been denied allowances and other entitlements on the basis of their same sexuality. In one case Mr Roger Muller has alleged that his employer, the Department of Foreign Affairs and Trade, discriminated against him on the ground of sexuality by refusing to pay him travel allowance in respect of his same sex partner. In another, Mr Jeff Kelland has alleged that his employer, the Department of Social Security discriminated by refusing to pay allowances that are normally paid to heterosexual partners living in remote areas.

In both cases the Commission found that there had been discrimination based on sexual preference. The Commonwealth has sought review of the findings in the Federal Court. The cases will shed important light on the meaning of the phrase "living as a spouse" in public service determinations concerning entitlement to employment allowances.

The Commission has a number of complaint cases pending where complainants have alleged discrimination in such instances. New public sector enterprise agreements in 1994 and 1995 eliminated many of these discriminatory provisions. They persist however in other areas of employment.

Other discrimination issues

Health

Gay men and lesbians can suffer discrimination in the delivery of medical treatment. They can experience discrimination in the refusal of medical treatment, being given inadequate or inappropriate treatment, breaches in confidentiality in treatment, the exclusion of partners from hospital visiting rights and the provision of medical consent.

Gay men in particular may experience discrimination from medical providers on the basis that they are a group at high risk from the HIV/AIDS virus. Although private medical service providers are under no legal obligation to accept patients, medical ethics applying in all situations should oblige doctors, dentists and other providers to offer adequate treatment and respect confidentiality.

Accommodation

Recent surveys in the gay and lesbian community have confirmed that discrimination still occasionally arises in housing and tenancy. In this case, gay men and lesbians are denied access to housing by landlords and/or rental agencies purely on the basis of their sexual orientation. Shelter is a basic human right and need, guaranteed in the ICESCR. Discrimination in access to this right is a serious violation of human rights.

Age of consent laws

There is no consistency in the laws of the States and Territories on the age of consent to sex.

In the ACT the age of consent for both heterosexual and homosexual intercourse is 16 years. In NSW and Queensland the age of consent is 16 years for heterosexual sex and 18 years for homosexual sex. In South Australia the age of consent for both heterosexual and homosexual sex is 17 years. In the Northern Territory the age of sexual consent is 16 years for

girls and 18 years for boys.

Under Tasmanian law the age of consent for heterosexual sex is 17 years while homosexual sex between males of any age remains illegal. In Victoria there is no specific age of consent but there are several offences relating to sexual penetration of children between the ages of 10 and 16. Western Australia has similar laws but specifies 21 years as the age of consent for homosexual sex. Commonwealth legislation, however, has established an effective age of consent of 18 years for homosexual sex in Tasmania and Western Australia.

The clear discrepancy in some jurisdictions between the age of consent to homosexual sex and that to heterosexual sex is prima facie discriminatory. It is indicative of the disjointed approach in this area. This exposes gay men and lesbians to criminal penalties in situations where heterosexual men and women are not.

Indeed, the marked lack of uniformity in Australia's age of consent laws affects not just gay men and lesbians but also heterosexual Australians as it leaves criminality dependent upon the State or Territory in which a person happens to be.

Education

Discriminatory practices persist in educational institutions. Surveys conducted by the gay and lesbian community indicate that gay and lesbian students and teachers in educational institutions are often subjected to anti-gay and lesbian jokes, discriminated against in assessment and marking and on occasions expelled or refused entry to courses. More generally, there is need for classroom education on a whole range of human rights issues, including homophobia.

Studies have consistently identified adolescent boys as the group most likely to perpetrate racist and homophobic violence. There is need for a national curriculum directed towards eliminating homophobia from schools.

Educational institutions fail as employers and as providers of quality education if qualified teachers and their students are forced out, harassed or otherwise victimised because of their sexual orientation. Anti-discrimination law can address individual cases, but its broader effectiveness depends on gay men and lesbians using it.

Vilification and violence

Gay men and lesbians are often the victims of violence and abuse, including

harassment, often physical. Violence is a serious issue for gay men and lesbians, probably the worst form of discrimination. It is the most extreme form of human rights violation because it goes to the right to life and physical well-being. It can even be perpetrated by police.

Violence against gay men and lesbians includes brutal murders such as that of Mr Richard Johnson who was bashed to death in a suburban park in Sydney in late 1991. The perpetrators committed the crime for purely homophobic reasons. Lesbians in particular are extremely vulnerable to street violence and verbal abuse. According to research conducted by the NSW Attorney-General's Department, Juvenile Crime Prevention Division, lesbians are six times more likely to experience violence than Sydney women in general and gay men are four times more likely to experience violence than Sydney males generally.

Strip searching of hundreds of "Tasty" nightclub patrons by police in Melbourne in August 1994 is an example of police harassment. Subsequent judicial and other inquiries found the strip searching was totally unnecessary and an abuse of police power. In the first civil ruling arising from the raid, Judge Leonard Ostrowski of the Victorian County Court awarded one of the female patrons $10,000 for the pain, suffering and humiliation she endured. Judge Ostrowski ruled that the actions of police involved in the raid exceeded the search warrant and that the detention and consequent strip search of each patron on the night was "unreasonable" and amounted to "assault".

Only New South Wales offers legislative protection against vilification based on homosexuality. The NSW Parliament passed the *Anti Discrimination (Homosexual Vilification) Amendment Act 1993* which came into operation in March 1994. This legislation makes it unlawful to incite hatred towards, serious contempt for or severe ridicule of a person or a group on the ground of homosexuality of the person or of members of the group.

Discrimination and same-sex relationships

Taxation and social security

Federal income tax and social security legislation determines a variety of entitlements on the basis of the relationship status of individuals but people of the same sex who live together on a genuine domestic basis are consistently treated differently. Same sex couples are treated as separate, independent and unconnected people. Legislative definitions used in federal laws exclude the relevance of notions of interdependence that apply to heterosexual couples from application to partners of the same sex. The

definition of spouse in s.6 of the *Income Tax Assessment Act 1936* for example includes de facto heterosexual relationships but only for those who live with another person on a bona fide domestic basis as "husband or wife". The *Social Security Act 1991* definition of a couple in s.4(2) similarly contains the specific requirement that couples be "persons of the opposite sex".

The advantages for people in relationships under the *Income Tax Assessment Act 1936,* such as rebates on income tax for a dependent spouse and their medical expenses, rebates for carers of family members and invalid relatives, income splitting, concessions in relation to the transfer of property and assets to a spouse as a result of the breakdown of relationships and in relation to family trusts, are accordingly denied to people in same sex relationships.

In addition, s.27AAA of the *Income Tax Assessment Act 1936* provides concessions for death benefits paid from superannuation schemes to dependents. However same sex partners who do not satisfy the definition of dependent for the purposes of superannuation legislation are also precluded from claiming concessions under tax laws. The effects of the unfavourable treatment afforded under superannuation legislation already discussed are continued in the taxation treatment of death benefits paid to persons who do not quality as dependents.

On the other hand entitlements to benefits under the *Social Security Act 1991* are generally less beneficial for people in relationships. For example benefits are reduced or denied where the income of a spouse is above a threshold amount and the benefits payable to couples are less than would be payable to two unrelated individuals. In these circumstances same sex couples are treated as individuals and receive benefits exceeding those payable to different sex couples. In other circumstances however social security entitlements may not be contingent on the relationship status of the recipient at all. For example the carer pension is payable simply on the basis of the provision of carer support.

Accordingly none of the tax or social security benefits or detriments that apply to heterosexual couples, whether they be married or de facto, apply to people in same sex relationships.

Immigration

In recent years, policy changes to Australia's immigration program have enabled recognition of same sex relationships in decision making. Gay men and lesbians can now sponsor their same sex partners for immigration. They

are no longer discriminated against when applying within the interdependency categories.

Applications are now being treated on equal terms with applications received from heterosexual partners. Under the changes, two persons applying under the migration category must show that they have a mutual commitment to a shared life together or do not live separately and apart on a permanent basis. The Department of Immigration and Multicultural Affairs encourages applicants to show thorough documentary evidence that they have been together for some time to strengthen the application. Procedures are similar to that applying in the case of heterosexual de facto couples.

Health and medical insurance

Health insurers often fail to extend health insurance cover to same sex couples on the same basis as different sex couples.

A recent NSW case *Brown & Hope v NIB Health Fund Ltd* highlights some of the issues arising in the health insurance area. NIB refused to allow Mr William Brown and Mr Andrew Hope, who live together in a homosexual relationship, and Mr Hope's son to have joint health cover at the "family" or "concessional" rate. Discrimination was alleged on the ground of homosexuality under the *Anti Discrimination Act 1977* (NSW). The NSW Equal Opportunity Tribunal found nothing in the NIB's rules to prevent NIB from accepting Andrew Hope, his son and William Brown at the concessional rate. The Tribunal found that NIB had discriminated in refusing them membership of the health benefits fund at the concessional rate.

NIB argued that the provisions of the *Anti Discrimination Act 1977* (NSW) were inconsistent with the *National Health Act 1953* (Cth) and thus invalid under section 109 of the Constitution. The *National Health Act* sets out provisions for eligibility for registration with the Commonwealth as a registered medical benefits organisation. Sections 70 and 72A of the Act establish the process under which applications are assessed and the rules of a fund taken into account for the purposes of considering any application. The Tribunal found no evident intention in the Commonwealth Act to preclude the operation of the *Anti Discrimination Act 1977.* The *National Health Act* had no bearing at all in the matter and there were no grounds to support NIB's argument of constitutional inconsistency. The NSW Supreme Court rejected NIB's appeal against the Tribunal ruling and found that there was an entitlement to the family insurance rate.

Evidence before the Tribunal established that concessional or the equivalent family rate is made available to bona fide same sex couples by other health

benefits funds of a comparable nature to NIB in the market place. These include HCF Health Fund, MBF Health Fund and others.

Family law

Laws provide property rights on relationship breakdown for married couples and for heterosexual couples under de facto relationships legislation. There is no equivalent protection of the rights and entitlements of people in same sex relationships in most States and Territories. The ACT's *Domestic Relationships Act 1994* however provides a simple mechanism for the division of property on the breakdown of relationships, including gay and lesbian relationships.

Another issue of concern to lesbians is discrimination against them in the exercise of judicial decision making in child custody cases at the breakdown of relationships. Any discrimination results not from the prescriptions of the *Family Law Act 1975* but from bias which lesbian women sometimes perceive in the manner in which the test of "the child's best interest" is applied.

Another issue of concern for lesbians and gay men is the failure of the legal system to acknowledge the parenting role and attachment to a child formed by a same sex partner of the biological parent of a child in the event of the death of that parent.

Intestacy and wills

Legal provisions for intestacy do not fall within Commonwealth jurisdiction. Intestacy is nevertheless an important issue of discrimination for gay men and lesbians due to the failure to recognise same sex relationships.

All Australian States and the Northern Territory have estate laws which exclude same sex partners from being recognised on intestacy and cause difficulties in contesting wills. For example, under the NSW *Wills Probate and Administration Act 1898*, where gay men and lesbians die without leaving a will, their long time partners have no rights to claim the estate.

The only Australian jurisdiction to deal with this area of discrimination is the Australian Capital Territory. In April 1996 the ACT Legislative Assembly passed amendments to the *Administration and Probate Act* to allow deceased estates to be distributed to de facto, gay and lesbian partners and to provide a "statutory legacy" payment to them of $100,000 if their partner dies intestate before the remaining estate can be distributed. These amendments define "eligible partner" as a person "other than the intestate's

legal spouse who, whether or not of the same gender of the intestate, was living..., as a member of a couple.... for two years or more continuously" or the parent of a child under the age of 18 to their partner. The changes also removed gender specific terms.

The ACT legislation also amended the *Family Provision Act* to allow de facto, gay and lesbian partners the right to contest their partner's will. Previously only different sex spouses or family members had standing to contest a will.

Although there are still deficiencies, this ACT legislation is a significant improvement on the situation in all other Australian jurisdictions in attempting to remove discrimination against gay men and lesbians.

Rights on illness and death of partner

As with laws affecting wills and probate, laws affecting other rights on the illness and death of a same sex partner are primarily the responsibility of States and Territories. Same sex partners are not extended the same rights as heterosexual partners in relation to inquests, funeral arrangements, victim compensation for psychological injury following death or injury of partners and damages for wrongful death. Similarly where a gay man or lesbian is fatally injured in road accidents, a same sex partner has no rights to pursue actions for compensation unlike a heterosexual or de facto partner.

Gay men and lesbians also encounter discrimination in relation to the right to consent when a partner dies. For instance, the NSW *Coroners Act 1980* and the *Human Tissue Act 1983* are typical of legislation in jurisdictions across Australia. The *Coroners Act 1980* gives relatives of a deceased person a right in certain circumstances to request an inquest or to be given notice of an inquest. The *Human Tissue Act 1983* deals with consents for the removal of tissue after death and for post-mortem examinations. Terms such as "spouse", "relative" and "next of kin" are typically used in these forms of legislation. In all jurisdictions there is a uniform failure to recognise same sex partners as a spouse or relative or next of kin and therefore gay men and lesbians have no rights in such circumstances.

The National Census

The 1996 National Census is an example of how some government agencies are responding to the need to recognise same sex relationships. For the first time same sex de facto couples were able to register their relationships and have them counted in population statistics. In the past, same sex couples living together were recorded as two unrelated adults in a household.

This approach is welcome and could be adopted by other Commonwealth agencies as it more appropriately reflects the living arrangements of a significant number of Australians.

Trans-gender specific issues

Different terms and definitions are used to refer to trans-gender/transsexual/ reassigned persons and much has been written on this issue, including a recent discussion paper by the Sex Discrimination Commissioner. The definition of persons of trans-gender identity recommended in that paper has been adopted here. It refers to persons whose biological birth sex is at variance with their preferred gender identity and who

- adopt or seek to adopt the social, behavioural, psychological and/or physiological characteristics of that preferred gender identity; and
- live or seek to live in conformity with that preferred gender identity.

Persons of trans-gender identity experience prejudice and discrimination in many areas including forms of identification, medical treatment, employment, inheritance, parental rights and social security benefits.

Discrimination they face is often the result of failure to recognise in law their gender identity thus denying them equal status in society. Essentially they suffer discrimination because they do not conform to accepted male or female social and behavioural roles. There is an additional form of denial of rights because of the difficulties of classification of their sex and the stage at which such a classification might occur.

Much of the debate in this matter centres on the question at what point a person assumes different gender and to what extent sex reassignment by operation must take place. The arguments are complex and there is a distinct lack agreement on this point.

Some academics suggest that what really matters is the ability and potential of the person to interact comfortably in society and that sex classification for sex identity should proceed on a social functional and/or behavioural basis. According to this view, a person who identifies and behaves as a male or female should be recognised by the law as a male or female regardless of biological considerations. Consequently chromosome analysis would be irrelevant to the determination of a person's gender.

There is a certain irrevocability about sex reassignment. A post-operative male-to-female transsexual has done all she can to assimilate her bodily constitution to that of a female, while abandoning that of a male. This is not

so for a pre-operative transsexual.

The distinction between pre- and post-operative transsexuals is an important one. There are certain factors common to both. The pre-operative person may share the psychological orientation to the same degree as the post-operative person. However, the psychological sex and the anatomical sex of the person have not been harmonised.

Others argue that, if a pre-operative person of trans-gender identity were, for whatever reason, to have a change of mind, there would be nothing to stop her reverting to her former male status. Irreversibility is an important aspect of this discussion. In reality the likelihood of this reversion happening may be extremely remote. However legal recognition of trans-gender identity will involve how the trans-gender perceives him or herself, acceptance by the community and the strength of commitment to the new gender.

In recent years the law appears to have accepted the irrevocability and finality of the gender transfer once reassignment takes place. Indeed there have been several cases specifically addressing the classification issue in various Australian jurisdictions.

In a number of social security cases post-operative persons of trans-gender identity were recognised legally for the purposes of the *Social Security Act 1991* as being of the sex they had physically changed to. Importantly one case held that pre-operative persons of trans-gender identity should be recognised legally as members of the sex which they were recognised as being at birth.

There is no federal legislation in Australia to accord legal recognition to the reassigned gender of persons of trans-gender identity or the self-identified gender of pre-operative persons of trans-gender identity.

In 1984 the Standing Committee of the Attorneys-General (SCAG) discussed legislative reform options to deal with trans-gender issues and recommended legislation dealing with sex reassignment surgery. At the time the Commonwealth Government considered that legislation was necessary to protect from discrimination persons whose gender had been reassigned.

SCAG recommended that, where the Registrar re-registers the birth of a person pursuant to the proposed Act, a notation on the original entry of birth be made indicating that the birth had been re-registered on another page of the Register of Births. The original birth certificate was to remain as an historical document while the revised certificate could be used for other purposes.

New South Wales, South Australia, the Australian Capital Territory and the Northern Territory offer some form of legislative protection against discrimination for persons of trans-gender identity. In NSW the *Anti Discrimination Act* as amended by the *Transgender (Anti Discrimination) Act 1996* refers specifically to persons of trans-gender identity while South Australia, ACT and the Northern Territory prohibit discrimination on the ground of transsexuality. The definitions of sexuality contained in these acts provide that "sexuality" includes transsexuality in addition to

heterosexuality, homosexuality and bisexuality.

South Australia is the only State to provide legal recognition of the reassigned sex of a person under the Sex *Reassignment Act 1988.* This legislative model includes provision for a sex recognition certification.

The Department of Foreign Affairs and Trade provides for the grant of a passport showing the sex/gender of reassignment of post-operative persons of trans-gender identity who wish to travel abroad. Pre-operative persons of trans-gender identity may be granted a "Document of Identity". A letter accompanying the grant of a passport or Document of Identity states that the Government of Australia does not recognise the change and that the granting of the application does not reflect the Government's view of the applicant's legal status.

There is some support in overseas cases for the view that failure to recognise legally the reassigned sex of post-operative persons of trans-gender identity may breach certain human rights obligations pursuant to the European Convention on Human Rights. It has also been suggested that denial of legal recognition could constitute a breach of the ICCPR.

The issue of when to recognise a changed gender may be relevant to gender recognition laws but it has less significance for the purpose of anti-discrimination law. Legislation against discrimination against persons of trans-gender identity should include both pre- and post-operative people. It should also include persons who are discriminated against because they are thought to be of trans-gender identity.

Several European countries have legislatively acknowledged the reassigned sex of persons of trans-gender identity. In Sweden, Germany, the Czech Republic, Greece, Italy, Netherlands, Switzerland and Finland the "new sex" of a post-operative trans-gender is legally recognised. Consequently a person of trans-gender identity can enter into a heterosexual marriage and can complete without concern documents that require details of gender such as banking, driving and insurance documents.

In the United States a number of States have allowed changes to be made to

the gender noted on birth registers, although not all of these expressly provide for it by statute. In Canada, Quebec has provided for re-registration by statute.

Coverage provided by the Sex Discrimination Act 1984

Trans-gender discrimination does not fit easily within the existing definition of sex discrimination in the *Sex Discrimination Act 1984* (SDA). The Act defines "woman" as meaning "a member of the female sex irrespective of age" and a "man" in similar terms. The initial issue to be determined then is whether a person whose gender has changed from male to female can be defined as a "woman" or a person whose gender has changed from female to male as a "man".

Certainly pre-operative persons of trans-gender identity could not be considered as satisfying the definition of "sex" in section 5 of the SDA and therefore are unable to access the complaint mechanisms under the SDA without legislation to recognise their gender identity. However, post-operative persons of trans-gender identity could conceivably be covered by the current provisions.

A male-to-female pre-operative person of trans-gender identity discriminated against on the basis of sex would have no avenue for complaint under the SDA. The direct discrimination section specifically refers to the "sex of the aggrieved person". In law the sex of the aggrieved person is male but in this instance the discrimination is not linked to the aggrieved person's male status.

The objects of the SDA are broadly framed but they clearly indicate that the purpose of the SDA is to deal with discrimination against persons because they are male or female, because they are of a particular marital status or because of factors shared by many women. Only women can become pregnant and women in the workforce experience greater difficulties than men where employment practices fail to take into account family responsibilities.

The coverage of the SDA is not sufficient to provide adequate protection against discrimination based on trans-gender identity. Even if there is legal recognition of the reassigned sex of post-operative persons of trans-gender identity and of the gender which pre-operative persons of trans-gender identity identify themselves to be, the current definition of discrimination in the Act would limit the protection available.

Options for gay men, lesbians and persons of trans-gender identity

Legislative protection against discrimination

Discrimination against people on the ground of their sexual orientation and trans-gender identity remains an issue of serious concern adversely affecting the rights of individuals. Discrimination against lesbians and gay men and those who identify as trans-gender also reveals a common theme: that the source of much discrimination is the failure of the law to afford recognition to relationships of partnership between people of the same sex and the failure to give appropriate recognition to changes in gender.

Effective protection against discrimination obviously involves many areas of Commonwealth, State, and Territory legislation and practice. Clearly not all rights can be effectively addressed by national anti-discrimination legislation alone. Equally clearly, however, national legislation is important if these rights are to be actually implemented and if equal protection of the law is to extend to all genuine relationships in a consistent manner across Australian jurisdictions.

The enactment of national legislation prohibiting discrimination on the ground of sexual preference and trans-gender identity such as that proposed in the Sexuality Discrimination Bill 1995 would effect many important protections although some issues require further consultation. There is no doubt, however, about the need for broad based protections along the lines proposed. The basic components of national legislation for the elimination of discrimination on the ground of sexual preference and trans-gender identity would be envisaged to include:

- the prohibition of discrimination on grounds of sexual preference or sexual orientation (including on the grounds of being a lesbian or a gay man) or trans-gender identity in a range of areas including employment; education; access to premises; goods, services and facilities; accommodation; land; clubs and incorporated associations; sport; and the administration of laws and programs;
- the incorporation of a sensitive definition of who is to be covered in a prohibition of discrimination on grounds of trans-gender identity in a range of areas including employment; education; access to premises; goods, services and facilities; accommodation; land; clubs and incorporated associations; sport; and the administration of laws and programs;
- the provision for a range of temporary and reviewable exemptions from the operation of the legislation to allow the modification of laws and programs in a transitionary period;

- a complaints mechanism with a conciliation and determination process.

In addition there is need for some explicit recognition in law of partnerships between persons of the same sex and in relationships where one person is trans-gender. Protecting the rights of persons of trans-gender identity also requires explicit legal recognition of change of gender in appropriate circumstances.

Recognition of same sex relationships

The failure to afford the recognition to same sex relationships not only denies same sex partners the opportunity to make a public commitment to each other but also denies a range of entitlements otherwise available to partners in genuine relationships. If the law is to afford freedom of expression and identity in private life, individuals who wish to have their relationships recognised should be entitled to obtain that recognition without discrimination. The rights of individuals to their own identity and to their private life inherently involve an obligation to ensure that individuals are not discriminated against on the basis of these private matters.

What is required in addition to general anti-discrimination prohibitions is some form of legal recognition of same sex and trans-gender relationships. Australia has already recognised these relationships in immigration law through the provision of a category of "interdependent partners" to allow both homosexual and heterosexual relationships to continue in Australia on the basis of the genuineness of the relationship as expressed through emotional bonds, stability and serious attachments to a partner. The courts have also sought where possible to apply non-discriminatory criteria in a manner which recognises actual relationships for the purposes of health insurance.

There is general agreement that amendments to the *Marriage Act* to enable marriage between same sex partners is not an appropriate approach to these issues in Australia. Alternative approaches are the enactment of registered partnerships laws which would enable same sex couples to choose to obtain legal recognition of their relationships or the de facto model which affords legal relationship status on the basis of the same range of criteria as for heterosexual couples.

Denmark was the first country in the world to afford recognition of same sex relationships. It adopted the partnership registration model by enactment of the Act of Registration of Partnership in 1989. The Act requires registration of the partnership and gives homosexual couples the same rights and duties as married couples with some exceptions such as in

relation to children. Norway later took a similar approach.

In Sweden and Holland the de facto model has been adopted, providing similar recognition to that given to heterosexual relationships in Australia on the basis of the existence of interdependency rather than formal registration or declaration.

The partnership registration scheme in Denmark and Norway provides the opportunity of public and formal declaration of attachment. The de facto model affords equal status to non-marriage heterosexual relationships.

The jurisdiction of the *Family Law Act* extends to de facto relationships only in relation to children and only on the basis of a reference of powers from the States. The Commonwealth may not have the power to legislate to confer legal status on partnerships of same sex couples. However, it could ensure equal rights and obligations to same sex relationships in its own laws. Extensive consultation would be required to ensure commitment to consistent standards.

Recognition of trans-gender identity

There is increasing consensus across the state and territory governments that trans-gender identity should be recognised and discrimination on that basis proscribed.

Recognition of gender change should be based on respect for a person's right to gender self-identification and incorporate a behavioural perspective. Anti-discrimination legislation should not depend on whether or not the person has undergone sex reassignment surgery or other medical intervention. In addition, it should include provisions regarding the protection of privacy of information as to birth sex, for example, where documentation of birth sex is required for identification purposes. Constitutional issues of Commonwealth/State responsibility may again arise in relation to the registration of births.